SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, A. D. 1901.

NO. 80.

THE MIDWAY COMPANY,
Plaintiff in Error,

vs.

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN and MARGARETHA LONSTORF,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR—MERRILL M. CLARK, RICHARD H. FAGAN and LEONIDAS MERRITT.

Statement of Facts.

In 1830, the Government of the United States entered into a treaty with the Sioux Indians, by the terms of which large tracts of territory were ceded to the government. By virtue of the ninth article of this treaty, the Sioux Indians were per-

mitted to bestow upon the Sioux half-breeds or mixed bloods a tract of land out of the territory, theretofore held by them, fifteen miles wide by thirty-two miles long, lying along the north westerly shore of the Mississippi River and Lake Pepin, in the territory of Minnesota, and a few miles southerly of the city of St. Paul. This treaty will be found in the 7 Statutes at Large, page 330. Shortly afterward the Sioux half-breeds removed to this reservation and in the main, continued to reside there until 1854. In 1854, the Congress of the United States passed an act which took effect July 17, of that year, whereby the president of the United States was authorized to exchange with the half-breeds or mixed bloods of the said Sioux nation, who were entitled to an interest therein, for the said tract of land which was set apart to them under the said ninth article of the treaty, and to cause to be issued to such persons, upon execution by them to the United States of a relinquishment of all their right and interest in and to said reservation, scrip or certificates for the same amount of land which each of them would be entitled to in case of a division of said reservation, which certificates or scrip it was provided in the act, should be subject to location, among other, upon any unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands, not reserved by government, upon which they have respectively made improvements. The act will be found in the 10 Statutes at Large, page 304.

The principal features of this act, it may be noted, are as follows: That upon the relinquishment by the half-breeds of their interest in the reservation, the government would issue to each half-breed certificates or scrip for an amount of land equal to his interest in the reservation, which land was to be selected by the half-breed out of any part of the public domain open to settlement or not otherwise appropriated or reserved; in effect a conveyance in severalty of such amount of land so to be selected; these certificates or scrip being provided in order to identify the half-breeds and inform the land officials who were entitled to receive land under the terms of this act, and each piece of scrip issued under the said provision contained the name of the half-breed to whom it was issued and stated the number of acres he was entitled to receive.

The land officials to whom the carrying out of the act was entrusted, determined that each half-breed was entitled to 480 acres, and there was issued to each half-breed five pieces of scrip, two pieces for forty acres each, one piece for eighty acres and two pieces for one hundred and sixty acres each.

The act provided that the half-breed might take either surveyed or unsurveyed land, but in case he selected unsurveyed lands, some improvemnts were required to be placed upon the land, the nature and character of which were not prescribed. The act did not require either residence upon or cultivation of the land by the half-breed. When

the scrip was located upon unsurveyed land, the scrip was surrendered and filed in the local land office, the same as on surveyed lands, and the location was described by metes and bounds. After the lands had been surveyed, the scrip was adjusted to the surveyed lands and the lands entered given their proper designation of sub-division, section, town and range. The act contained no prohibition against the *transfer or conveyance of the land*, but provided that "no transfer or conveyance of any of said certificates or scrip shall be valid."

The first circular of instructions in regard to the location of this scrip was issued March 21st, 1857, and will be found in First Lester's Laws, 627. This circular required that the "land selected in satisfaction of a certificate or scrip, must be located in the name of the party in whose favor the scrip is issued and the location may be made by him or her in person, or by his or her guardian or duly authorized agent." This circular indicates, as the fact was, that many of the persons entitled to land under this act and in whose name scrip was issued, were then minors.

Orillie Moreau, afterwards married to Stram, was a beneficiary under this act, and to her scrip was issued by the authorities for 480 acres, certificate No. 19 D, for 160 acres, being one of the pieces of scrip so issued to her. No question is made as to the validity of her certificates.

On the 25th day of May, 1883, Orillie Stram and husband executed to Leonidas Merritt, a pow-

er of attorney to enter into and take possession of any and all pieces or parcels of land in the State of Minnesota which they then owned or of which they might thereafter become seized, or in any way interested in under and by virtue of the location of Sioux half-breed scrip No. 19 D for 160 acres, issued pursuant to said act of July 17th, 1854, to Orillie Moreau, then Stram, and authorized said Merritt to sell and convey said land (page 189 Transcript). At or about the same time, a power of attorney was executed to Frank W. Eaton, authorizing said Eaton to locate said scrip for and in the name of Orillie Stram, and to do all acts necessary to secure a permanent and bona fide location of the scrip. Reference to these powers is made in the deed shown at pages 183 et seq. of transcript.

It is claimed and perhaps may be admitted that when these powers were delivered, or at least one of them, the name of the donee in the powers was blank, but we will consider this later on. These powers of attorney were made to carry out an agreement which Eaton had made with Stram for the purchase of the land to which she was entitled, and to facilitate the entry, selection and conveyance thereof. A part of the purchase price was paid when the agreement was made, and the balance was to be paid "after the location was perfected and the scrip adjusted" (Transcript Fol. 340).

On June 16th, 1883, Eaton, acting under said power of attorney, located the scrip 19 D, in the name of Stram upon unsurveyed lands of the Unit-

ed States, by metes and bounds, which, after the lands were surveyed, were described, as Lots 3, 5 and 6 and the southeast quarter of the northwest quarter of section 30, in township 63 north, of range 11 west, and caused improvements to be made upon said lands, among other, a house to be constructed 14x16 feet, with floor, roof, door and window, bunk and table (pages 117-118 Transcrip). The scrip was received and the entry allowed and the character and fact of the improvements established to the satisfaction of the land office authorities (see pages 166-169 Transcript). On July 20th, 1885, the maps of the survey of the township were filed in the land office, and upon the next day, upon the application of said Eaton, acting in the name of and under the power of attorney from Stram, the scrip was adjusted to the surveyed lands (see Fol. 510-512 of Transcript for application to locate and adjust the scrip upon the surveyed lands, and Fol. 513 for certificate of local land officers as to adjustment). After the scrip was located and the entry allowed, Merritt conveyed the land, acting under his power of attorney, conveying a seven-ninths interest to Eaton and the residue to other parties by Eaton's direction, and to the title and rights thus obtained, the defendants succeeded by mesne conveyances in the following proportions: Frank W. Eaton 13-36, Merrill M. Clark 9-36 and Margaretha Lonstorf 8-36 and Richard H. Fagan 6-36. This fact is admitted on the record (see Fol. 297 and Fol. 94 and 99 of Transcript).

On the 20th day of July, 1885, one Thomas W. Hyde applied to make pre-emption filing for Lots 5 and 6 and the S. E. 1-4 of the N. W. 1-4 of said section, which application was rejected by the land office authorities as conflicting with the scrip location of Orillie (Moreau) Stram. Hyde afterwards made allegations in support of his offered entry, that the scrip location was invalid because the half-breed had never been upon the land and because the improvements made thereon were not made by her or under her supervision and claimed that he had settled on the land in 1884. In support of the charges thus made he filed a paper purporting to be an affidavit made by the scripee in 1884, in which she denied having made the power of attorney to Eaton, and denied having authorized him to make the improvements on the land, altho' the scrip entry had been allowed on the unsurveyed and adjusted to the surveyed land. A hearing upon the Hyde attack was ordered which was had April 6, 1886. Between the date of the complaint and the date of the hearing the scripee and her husband executed a deed of confirmation to said Eaton acknowledging, ratifying and confirming all that Eaton had done and reciting, ratifying and confirming the conveyances which had been made by said Merritt as the attorney in fact of said scripee, and further containing a new conveyance of the land or of 7-9 thereof to said Eaton (see Exhibit B., pp. 81 et seq. Transcript). This the scripee had in the beginning agreed to do (Fol. 336 Transcript). The result of the hearing was that

it was and has ever since in all successive appeals been held that Hyde's attempted entry was fraudulent and void and all rights have always been denied him, and all recognition of any rights enuring to him denied both by the land department, from the lowest to the highest official therein, and, as well, by the courts.

A reference to the following decisions in cases which have arisen mainly between the subsequent applicants for these lands, will verify this statement.

Hyde vs. Eaton, 12 L. D., 156.
Hyde vs. Warren, 14 L. D., 576.
Same case on review, 15 L. D., 415.
Bishop Iron Co. vs. Hyde, 66 Minn., 24,
Hyde vs. Bishop Iron Co., 177 U. S., 281, L. Ed. 771.

The local land officers upon the hearing found the facts substantially as out-lined, referred to the two powers of attorney, found that the scripee had never asked to have the location set aside, but, on the contrary, had executed and delivered a deed ratifying and confirming all that had been done; found specifically that "there is nothing in the evidence to show that this scripee was misled or imposed upon by the defendant or his agents," and held that the location was effected in strict conformity with the usual and accepted practice and sustained the same (Fols. 195-199, Transcript).

The scripee herself never appeared to ques-

tion the entry, nor any act that had been done under her powers of attorney, nor was she called as a witness, and there is sufficient in the record to show that the affidavit which had been obtained from the scripee had been secured by some imposition upon her by Hyde or his attorney, who had made a corrupt agreement with him, but this wrong was righted by the deed of ratification.

Hyde appealed to the Commissioner of the General Land Office who sustained all of the findings of fact of the local land officers, but decided against the scrip locations, solely because the scripee had not seen the land or improvements and *because the circular of instructions from the Department required the Indian to have direct connection with the land* pp. 70-72 of Transcript). From this decision, appeal was taken to the Secretary of the Interior, who affirmed the decision of the Commissioner and stated at length the grounds of his decision (pp. 72-74, Transcript). Hyde was disposed of as being without rights in the land and as being guilty of fraud (pp. 74-81, Transcript).

The decision of the Secretary was not reported in as much as on the same day he decided the case of Allen vs. Merrill which is reported in the 8 L. D., 207, in which latter case involving almost the same questions, his reasons are given more at length than in the case of Hyde vs. Eaton, the decision in which case can be found at page 63 of the Transcript.

The result of the Secretary's decision was to throw the land open to entry to other parties. Then

commenced the scramble by sundry speculators and their representatives, including the plaintiff in error, or those under whom it claims, and the continued scramble has furnished considerable business both for the land department and for the courts; one Frank Hicks having been permitted to locate said Lots 3, 5, and 6 with scrip, under whom the plaintiff claims, and to whom the same was patented, and one Emil Hartmann having been permitted to scrip the S. E. 1-4 of the N. W. 1-4 of said section to whom the same was patented and through whom the plaintiff claims. But in none of these proceedings which culminated in the issuance of patents in 1898, to the plaintiff's predecessors and grantors, were these defendants or their predecessors parties or participants, but they have ever stood upon their rights and asserted their ownership under the scrip location. It is admitted that this plaintiff and its predecessors had full knowledge of the rights of these defendants (Fol. 303, Transcript).

When these various parties had fought each other to a finish, it was still necessary to determine the rights of the scripee and those claiming under her, these defendants. This action was brought for that purpose, the complaint being the ordinary one used in such actions for the determination of adverse claims. The answers, however, not only deny the rights of the plaintiff, but are substantially bills in equity which set out at length and in detail all of the proceedings in the land department, allege that the decision of the Secretary was in viola-

tion of the rights of the scripee and those claiming under her, contrary to law and to the established and uniform practice of the land department since the passage of the Act of 1854, and ask that the plaintiff be declared to be the holder of the legal title in trust for the defendants.

The question of innocent purchasers does not arise in the case and it was freely declared on the trial that there was no question of fraud or bad faith on the part of Eaton in his dealings with Stram; that he had no intention of evading the provisions of the Act of 1854, but believed that in what he did he was acting within his rights and in accordance with the law. The only question is whether, under the law and under the facts as established, the Secretary's decision, cancelling the scrip location, was right or wrong, plaintiff's position being that Eaton misconstrued the purport of the law and misconceived what his rights were thereunder. These defendants had patiently and confidently waited for the contentions of the various parties seeking this land to reach that point where an action of this kind would lie, and but for the fact that the plaintiff brought the same with reasonable promptness, these defendants would have brought such an action. Hence they welcomed its commencement, tendered fully the whole issue, and upon the trial were awarded a judgment decreeing them to be the rightful owners of the land and that such bare legal title as might be held to have passed by the patent was held in trust for them as such owners and that they were entitled

to a conveyance thereof from the plaintiff, and that upon failure of the plaintiff to so convey the premises, a certified copy of the judgment, when recorded in the office of the Register of Deeds, should operate to transfer the same (pp. 51-62, Transcript).

The District Court of the 11th Judicial District of Minnesota, before which the case was tried, thus overturned the decision of the Secretary, held that the location of the scrip was valid and that the equitable title to the land was vested in the defendants. For memorandum opinion of the trial court, filed in connection with the findings (see pp. 86, 275 of Transcript).

A motion for a new trial was denied, judgment was entered pursuant to the findings and an appeal was taken to the Supreme Court of Minnesota from the order denying a new trial and from the judgment (see Transcript, pp. 273-275 for motion and order, pp. 302-305 for judgment, and p. 306 for appeal).

The appeal was argued April 25, 1900, (Fol. 371 Transcript). The decision of the trial court was affirmed in all respects and judgment entered accordingly May 29, 1900, (Fol. 369, Transcript). June 2nd, 1900, the plaintiff sued out a writ of error to this court. (See p. 344 Transcript for petition and p. 350 for allegations of error). The decision of the Supreme Court of Minnesota may be found on pages 330 et seq. Transcript.

The foregoing statement of the case is made because at the time we are required to prepare this brief we cannot know what statement of facts will

be made by the plaintiff in error. In no previous briefs in behalf of the plaintiff has there been, in our view, a fair, correct or complete statement of facts made.

ARGUMENT.

I.

Outline of Issues Involved.

The finality of the decision of the Secretary of the Interior of February 18th, 1889, is on trial in this case.

If that decision, upon the facts established in the record rests upon an error in the construction of the law or upon a mistake of fact, as conclusively shown from such record, resulting in granting a patent to a wrong person, the person aggrieved may have resort to the courts to redress the wrong.

James vs. Germania Iron Co., 107 Fed. Rep., 600.

The power of supervision lodged in the Department is not unlimited or arbitrary and cannot be exercised so as to deprive any person of land lawfully entered or paid for.

Germania Iron Co. vs. James, 89 Fed., 818.

Clerk Land Dept.

The finality and correctness of this decision has never been an issue in any cause until this action was brought. We believe the Departmental decision is clearly erroneous and that it and those cases since decided in the Department on the strength of it, stand here unsupported by reason or authority.

The trial court overturned the decision of the land department and inthis was sustained by the Supreme Court of the state. We believe the decisions were right and in harmony with prior decisions of the latter court and with the decisions of the honorable court which is now to finally pass upon the same. That any other conclusion would have been a travesty on justice and inconsistent with the law involved and the proper construction thereof, with a long course of judicial and departmental determination, and in total disregard of vested rights of many years standing.

The case of the plaintiff in error rests upon the correctness of the decision of the Secretary of the Interior. As we understand it, the contention of the Secretary and of the plaintiff is that the scrip location was invalid for two reasons:

1. Upon the unsurveyed land because the land office circular of January 29th, 1872, required the improvements to be made "by or under the personal supervision or direction of the Indian," and that they must be "for his personal use and benefit," and that the Indian must have "a direct connection with the land," and claim the same "for his per-

sonal use." The Secretary found that the improvements were not placed on the land by Stram but by Eaton, her attorney in fact, and that she had no direct connection with the land, and that the improvements were not for her personal use and benefit, and therefore concluded that the law had been violated in this respect.

2. Because he held that the execution and delivery by Stram of the power of attorney to convey the land was equivalent to a transfer of the scrip, and that assignments of the scrip were prohibited by the act and held that the power to convey was, for that reason, invalid and that, hence, the location of the scrip was invalid, although he held that the location could be effected by attorney in fact.

It might further be added that the Secretary decided the location upon the land after survey was not valid, although he held there were no intervening rights, because he ruled that such location was but an adjustment to the surveyed land of a previous invalid location.

The Secretary did not decide that patent was necessary to pass the title, but conceded it was not, upon a valid scrip location. He did not decide that the act prohibited the alienation of the land before entry or the making of contracts to sell the same, but held that the result of the transaction was a conveyance of the scrip and hence invalid, as contrary to the prohibition contained in the act, by

which in effect he treated a prohibition against the assignment of the scrip as a restraint upon the alienation of the land.

The contentions of the defendant in error are, briefly stated, as follows:

That the Act of 1854 did not require improvements upon unsurveyed lands to be made "by or under the personal supervision" of the half-breed, nor require him to have "personal contact with the land," and that any land office circulars making these requirements, were unauthorized and an enlargement of and addition to the terms of the law and hence invalid.

That the purpose of the law requiring improvements upon unsurveyed lands was simply to give notice to intending settlers of a prior claim to the land and to prevent such settlers from being misled into settling on the land, and hence that it was immaterial by whom the improvements were made; whether made in person, or under the personal supervision of the half-breed or by agent or attorney.

That no residence upon the land by the half-breed was required; he was not compelled to take it for his own use and benefit, and the original provisions of the act, which constituted a contract as well as a law, cannot be contracted by such a construction.

That as the sole purpose of the law in requiring improvements on unsurveyed lands was to give notice to intending settlers, and as the Secretary found no rights of third parties had intervened when on July 21st, 1885, Eaton applied to effect

the location upon the surveyed land and to adjust the scrip thereto, the government having and retaining the scrip, the location was valid as upon surveyed land and no improvements were required in such locations, either by the act of congress or any circular or requirement of the Department.

That neither the land office circular of 1857 (1 Lester's Land Lawws, p. 627,) nor the circular of 1864 (Copp's Public Land Laws, p. 721,) made any such requirement and that the circular of 1872 made these requirements, not only in violation of the act, but in violation of the construction which the Department had put upon the act for the period of eighteen years and the practice which had been in force during all that time. That the circulars of 1857 and 1864 and the circular of 1878 (2 C. L. L. 1355,) all provided that such scrip might be located either in person or by attorney and no distinction was made between surveyed and unsurveyed lands and the Secretary of the Interior in Allen vs. Merrill, 8 L. D., 219, conceded that such locations might be made by agent or attorney. That a valid power carries with it the right to do all things necessarily incident to carrying out the terms of the power. The power of attorney to Eaton specifically authorized him to do everything necessary to perfect a valid location; hence, the improvements being incidental to the location, the making of the same by the attorney in fact was valid.

The defendants admit that the transaction between Stram and Eaton had for its purpose the acquisition by Eaton of the land, or an interest there-

in, but deny that the same was an assignment of the scrip or that the same violated either the law or the spirit of the law prohibiting an assignment of the scrip. They claim that she had a right to sell and that Eaton had a right to buy the land which she was entitled to receive from the government, or to contract respecting the sale and for a conveyance thereof, either before or after the location of the scrip, and that there is nothing in the language of the act to indicate that congress intended to prohibit or to put restrictions upon the alienation of the land. They contend that the only purpose of the act in prohibiting the assignment of the scrip was to compel the location by, and the issuance of the evidence of title to or in the name of the scripee, so as to prevent the government from being involved in disputes over the ownership of the scrip and over the question of the right to enter land thereunder.

That if an agreement to convey the land was invalid and if the power of attorney authorizing its conveyance was invalid, it was wrong to cancel the scrip location, because, under the law and the uniform practice, and under the decision of the Secretary, himself, the scripee had a right to locate the scrip by power of attorney as was done in this case. The power to locate the scrip being valid and that method of location being valid and in accordance with the practice, no other rights intervening, the scripee having entirely confirmed the location, even tho' the Secretary thought the power to convey was invalid, he should have sustained the loca-

tion. That would have left the title in Stram and there is no claim that she was not entitled to 320 acres of land, or that this particular land was not subject to location under such scrip.

That force and effect should have been given to the deed of confirmation of March 31, 1886, to cure any technical defects or irregularities, if such existed. No injury was done the government. The Secretary does not claim it, but takes the position that the rights of the scripee have been infringed; the scripee did not take such position. She had a perfect right to ratify the acts of Eaton as the acts of herself after she became fully aware of all the facts.

The defendants further contend that the records of the land department, the decision of the local officers and the admissions of the Secretary himself, show that the manner in which Eaton and Stram used this scrip was identical in every particular with the practice that had prevailed from the time the act was passed until the decision in this case rendered in 1889. Such practice was open, notorious and so general and universal that it must be presumed the Department was fully aware of it, and it had been so long acquiesced in that it amounted to a practical construction of the law by the Department upon which the people had a right to rely.

That a former Secretary of the Interior had, by a decision rendered in 1863, decided that Sioux half-breed scrip could be used in the manner in which it was employed in this case, which decision

had never been questioned from the time it had been announced until the case of Hyde vs. Eaton arose; that it had become a rule of property and that it was inequitable and unconscionable to overturn it after such a lapse of time and after the rights of parties had become fixed thereunder.

That the law contained no provision indicative of any intent to restrain the alienation of the land, and that the Secretary erroneously applied the law as tho' it contained such prohibition and as tho' it restrained all contracts with reference to the land or the sale thereof.

That without a scintilla of evidence to support it, he found that the powers of attorney executed by the scripee, had, after many years passing through different hands, lodged in the hands of Frank W. Eaton who filled in the blanks, and, in direct contravention of the evidence, found that improvements, scarcely worthy of the name, had been made by Eaton on the land.

To briefly summarize, we claimed, pleaded, and we think, established from the record, that the Secretary erred in the following particulars:

1. In his construction of the law holding the scrip location invalid because improvements for the purpose of location were not made by the half-breed in person or under her personal supervision or for her personal use, and because she did not have personal contact with the land, and in totally misconstruing the purpose of requiring improvements, the same being only for the purpose of notice.

2. That he erred in giving paramount force, in derogation of the act, to the circular of the Department requiring these conditions to be complied with in enlargement of the requirements of the act.

3. In holding that the execution of a power of attorney to Merritt to sell and convey the land after it should be obtained, operated to invalidate a location made by her duly authorized agent to locate the scrip.

4. In so construing the law as to hold in effect that the provision prohibiting the assignment of the scrip operated as a restraint upon the alienation of the land and against making any contract for the sale of it and against executing an instrument of attorney authorizing its conveyance, prior to the location of the scrip.

5. In holding because she gave a power of attorney to one to locate and to another to convey after the land was obtained, that this operated to work an assignment of the scrip and to invalidate the entry, and in holding that any assignment or attempted assignment of the scrip by the scripee could deprive her of the right to enter the land either in person or by agent.

6. In holding that the scripee had no interest in the location of the scrip upon this or any other land, the same being both impossible in law and contrary to the evidence.

7. In not holding that the location of this

scrip was valid as upon surveyed lands when it was adjusted thereto after survey, without regard to any question of improvements.

8. In giving any effect whatever to the fact that in one or both of the powers of attorney the donee's name was blank when the same were delivered, the same being wholly immaterial, and in refusing to give effect to the confirmatory deed.

9. In finding, contrary to and unsupported by the evidence, that the powers of attorney had, after many years passing through different hands, lodged in the hands of Frank W. Eaton, who filled the blanks, etc.

10. In giving force and effect to immaterial matters with which the government had no concern, viz., the transactions or intended transactions of the scripee respecting the sale and disposition of the land, and in giving effect thereto to invalidate and cancel the valid location and selection of this land in satisfaction of the scrip.

11. In violating and reversing the settled rule of practice on which the parties had a right to rely, and the construction of the law which had for many years obtained, in full accord with which the parties acted in good faith.

12. In erroneously throwing or attempting to throw the land open to new entry, for the reason that the land had become segregated from the public domain and lawfully taken in satisfaction of the

scrip, and the rights of the scripee and those claiming under her had become vested therein. That the action of the Secretary in that respect was arbitray and without authority of law.

13. In not sustaining the scrip location and awarding the land thereunder to Orillie Stram.

The allegations of error upon which the writ was sued out by the plaintiff in error to this court, are such as not to require separate, detailed discussion, but, taken as a whole, the grievance expressed therein is that it was error to sustain the scrip location and the defendants' right to the land through the same, and in not sustaining the action of the Secretary of the Interior and in not holding his action in attempting to cancel such locations and award the land to the plaintiff, or its nominal predecessor, final, valid and conclusive and in affirming and not reversing the judgment of the trial court.

Hence the whole case upon which the judgments of the District Court of the County of St. Louis and of the Supreme Court of Minnesota rest, may as well be discussed in such manner as will bring before the court the controlling questions involved, from which we confidently believe the conclusions and judgments of said courts will be found correct and the allegations of error not sustained.

II.

The Law of 1854, Its Provisions, Intent and Effect.

The Act of 1854, under which the rights of these parties are to be determined, is brief and its purpose plain. It does not bestow a gratuity upon conditions or with restrictions; it does not evidence a gift. The rich agricultural lands on the west side of Lake Pepin, and reaching within close proximity to the capitol of the new territory, were wanted for the white man and the obstruction to the material development of the future commonwealth caused by the ownership and tribal occupancy of that magnificent and fertile tract by the Sioux half-breeds, was thus early in the history of the territory sought to be speedily removed.

This tract of land had, as suggested in our statement of the case, been reserved by the Indians from their cession to the government, and, at their request, by the government bestowed upon the half-breeds and mixed bloods of the Sioux nation, by solemn treaty with the government, nearly a generation before.

Mr. Justice Atwater of the Supreme Court of Minnesota, in the case of Monette vs. Cratt, which was decided in 1862, and reported in the 7 Minn., in speaking of this law said on page 184, of the Gilfillan Edition: "The main object of the act of July

17, 1854, appears to have been to get rid of the Indian or half-breed title to the reservation on the west side of Lake Pepin, and to bring the same into market. It is explicitly provided that the half-breeds should receive a certain quantity of scrip upon executing a complete relinquishment to the United States of their right, title and interest in and to the said reservation, in such form as the Commissioner of the General Land Office should prescribe."

Here in a case arising under this act and where the act, its scope and provisions were the subject of controversy, was a judicial declaration of the nature and purpose of the act by an able jurist and lawyer residing in close proximity to the tract in question, familiar with the whole history of the matter and with the transactions arising thereunder. We shall have occasion as we proceed, to refer to other judicial determinations of the Supreme Court of this state. We beg here to suggest that, while not claiming for the Supreme Court of Minnesota more than is due to it as a court of at least average learning and ability among the courts of our sister states, we do claim that there should be accorded to its decisions with respect to these matters, more than usual deference, sitting as it has at the very threshold of this tract of land, and in the midst of the scenes and transactions connected with and growing out of the dealings therewith under the treaty and enactment referred to, and with the public lands under and by virtue of the scrip issued in pursuance of this act. Its decisions upon the

various questions which have arisen thereunder have been, from the beginning until the determination of this case, consistent, vigorous and in harmony with the judicial determinations elsewhere, including this, the highest tribunal of the land.

By this Act of 1854, the government said to these half-breed people in substance and effect: "You surrender to the government these lands and your title and interest therein, and we will give you as much land elsewhere; we will give you certificates showing that you are entitled to have as much land anywhere in the public domain, not otherwise reserved or appropriated; these certificates shall evidence your right to take and have the amount of land therein specified in compensation for your relinquishment to the government of your pro rata interest, amounting to like acreage in this tract."

The act did not provide for a patent and except for the ordinary usage of issuing patents generally to convey in form the legal title, as referred to in the case in this court of Carter vs. Ruddy, 166 U. S., 493, it might well be deemed, as it was considered by Secretary Vilas, and by the court in Larriviere vs. Madegan, 1 Dillon, 455, and by this court in certain railway grants, that a patent was unnecessary. It is immaterial, however, to the determination of this case, whether it was or not. The act did not provide any condition whatsoever relative to surveyed lands. The lands being otherwise unappropriated, could be selected anywhere from the public domain, the scrip filed and surrendered in payment thereof, and at least the equitable title

was complete in the scripee upon the filing being accepted. As to unsurveyed lands, the only requirement was that some improvements should be made to mark the taking. A diagram of the lands was by the Department, for greater certainty, required to be filed in the local offices and as good a description of the land as could be given by metes and bounds, or by natural objects, thus obtained, and when the land was surveyed, the location was adjusted to the lines of the survey, either upon the application of the scripee, or if he failed to make it, by the land officers themselves. There was no residence required upon the land in either case; occupancy was not exacted; there was no other condition prescribed by which the half-breed should earn the land; it was paid for by the surrender of his interest in the reservation to the government, and the issuance of the scrip operated, to all practical intents and purposes, as a present grant, to take effect when the scrip had been anchored to some particular tract by its location. There was no amount of improvements specified. It was not provided nor required that any house or habitation should be erected thereon. There was no prohibition in the act against the alienation of the land. If the land was surveyed, the scrip could be located and the half-breed could convey it at once without ever having seen or been upon the land or spent a day or an hour of residence thereon. Nor does Secretary Vilas seem to regard that it was any different as to unsurveyed land, save in the matter of descriptions, and no reason appears why that view is not

correct, for it was not required that the half-breed should live upon or build any residence upon or make any home upon the unsurveyed land, only that some improvements should be made, and when the scrip was adjusted to it, the property to which the half-breed's title, at least his equitable title, was perfect, then became identified and received its proper final description among other lands surrounding it.

The purpose of requiring improvements in locating upon unsurveyed lands, has become a matter of some discussion in this case. We submit the improvements were not of paramount importance, but were only an incidental feature to the proceeding. They were not required in order to earn the land; there was no specification as to their character or extent, and there is wanting in the act as well as in the machinery provided after its enactment to carry it into effect, a single line or syllable upon which to base the claim that it was the intention of the government to require the half-breed to build a house or to make a residence, permanent or otherwise, upon the land. If the land was surveyed at the time of the location, no improvements were required.

The counsel for the plaintiff in error has spoken of the force and effect to be given to contemporaneous construction by the executive department of the laws involving matters within their jurisdiction. The Sioux half-breed scrip was issued in February, 1857. For the most part five pieces were is-

sued to each person, two for forty acres each, one for eighty acres and two for one hundred and sixty acres each, and thus the scrip has ever remained. These pieces of scrip were locatable anywhere within the public domain, on lands not otherwise appropriated. Did the government mean to provide that the half-breed should reside upon each piece or parcel? That such improvements as might be made must be made under his personal supervision and direction on each piece and parcel? That he should have personal contact with and reside upon each piece and parcel and take it for his own personal use and benefit? If so, it would indeed be a difficult task for the poor half-breed who might have to live upon one piece in Minnesota, another in California, another in Montana, another in Dakota and another some where else. The issuance of the scrip in this manner shows the construction put upon the act at the time.

If the half-breed had to have personal contact with the land, and if the view of Secretary Vilas is correct that congress had with respect to the half-breed's right under this act intended to express "the same general idea" as it did concerning the settlement upon public lands in the homestead and pre-emption laws (see p. 219, 8 L. D. for his statement in that regard), then it would seem quite necessary that all of these various pieces of scrip should be located upon contiguous tracts, and the recent decision of the local land officers in the case of Augusta Brown, found on pages 601-2 of Vol.

29, Land Decisions, so holding, would be the logical conclusion of such reasoning; but Mr. Secretary Hitchcock over-ruled the local officers in that regard and said, "the Act of July 17, 1854, (10 Stats. 304), which authorized the issuance of scrip in exchange for certain lands belonging to the Sioux Indians and mixed bloods, does not directly or by implication require that location of scrip be made on contiguous tracts."

The Sioux half-breed scrip was issued in February, 1857. On March 21, 1857, a circular of instructions was issued by the Department (1 Lester's Land Laws, 627) by the Hon. Thomas A. Hendricks, then Land Commissioner, the fourth clause of which circular of instructions read as follows:

> "Upon any unsurveyed land not reserved by government, upon which they have respectively made improvements. Where the scrip may be located on unsurveyed lands outside the reservation on which the half-breed has made improvements and which is not resrved by the government, his application for location should be accompanied by a diagram and description, denoting the natural objects and distances so as to fix with certainty the exact locality wanted, *which serves as the best notice in our power to settlers that conflict may be avoided, and enable you, when the public surveys are made, to designate the sub-divisions embracing the location.*"

This circular gives the only valid reason for the requirement of improvements on unsurveyed lands

which can be given, viz., that the same should serve as notice to other parties that the tract had been located and claimed, to the end that conflict might be avoided. Persons being thus put upon their inquiry, could readily ascertain at the land office by the filings the rights of the scripee.

No other reasonable reason can be given. It was not the purpose to make a home for the half-breed or mixed blood, unless he wanted to use the land for that purpose; there was nothing in the act indicating that Congress had any idea of making a homesteader of the half-breed. The purpose of the act was to compensate him in land, without restriction, for land equivalent in acreage, or his interest therein which he relinquished.

Mr. Justice Collins, speaking for the Supreme Court of Minnesota, in the decision in this case (79 Minn., 449,) said:

> "The law under which scrip was issued to the half-breeds or mixed bloods of the Sioux nation, was the Act of Congress of July 17th, 1854, (10 Statute, 304.) The act is not complicated. In some respects it is quite indefinite, but it empowered and authorized the President to cause to be issued to certain mixed bloods, certificates or scrip for the same amount of land to which each individual would be entitled in case of a division of the Pepin reservation among them pro rata,"

and on page 450, after some further statement, he said:

> "Thereafter and as empowered by the

1854 Act, the President caused certificates or scrip to be issued to these mixed bloods indiscriminately, and without reference to age, sex or other conditions. The result was that old and young, adults and minors, male and female, those that had but little Indian blood in their veins and those in whom such blood greatly prevailed, were the recipients. And this fact is not to be ignored when discussing the correctness of the Secretary's views, as found in his decision of February 18th, 1889. Under the law there were issued to each one of 640 persons (Mrs. Stram being one of the 640) five pieces of scrip, thus described: 1 A, 40 acres; 1 B, 40 acres; 1 C, 80 acres; 1 D, 160 acres; 1 E, 160 acres, a total of 480 acres each. To each one of 38 persons there was issued one piece for 40 acres, and two for 160 acres,—in all, 360 acres to each. And this is another fact to be kept in mind."

Then, after quoting from the decision of the court in Gilbert vs. Thompson, 14 Minn., 414, he said, on page 451:

"Further considering the law, it is well to look at the construction placed upon it by the officers of the Interior Department soon after scrip was issued to the beneficiaries—a construction contemporaneous with the passage of the law. We find that immediately after its issuance a circular was promulgated by the commissioner of the general land office for the information and guidance of the local officers, a clause of which read that locations might be made,

'Upon any unsurveyed lands, not reserved

by government, upon which they have respectively made improvements. Where the scrip may be located on unsurveyed lands outside of the reservation on which the half-breed has improvements, and which is not reserved by government, his application for location should be accompanied by a diagram and description, denoting natural objects and distances, so as to fix with certainty the exact locality wanted, serve as the best notice in our power to settlers, that conflict may be avoided, and enable you, when the public surveys are made, to designate the legal sub-divisions embracing the location.' 1 Lester's L. L., 628.

"We have discovered that it was required, not that the improvements upon unsurveyed lands must be of a reliable or permanent character, or that they should be made by the scripee or under his personal direction, but that the application should be accompanied by a diagram and description, that the exact locality might be designated, and thus, in connection with the improvements upon the ground, conflicts might be avoided between claimants, and the locations more easily and certainly adjusted when surveys were actually made. The making of improvements by or under the scripee's immediate direction, was not made of prime importance by the commissioner when preparing these instructions. The practice and custom of making scrip entries was definitely understood and well settled in the seventeen years which followed, prior to the issuance of another circular."

and further on, at the bottom of page 451, he says:

"We are of the opinion that the purpose of this feature of the law, requiring improvements to be made where the scrip was located

on unsurveyed lands, must have been that visible notice, by work done on the ground, might thereby be given to other persons of the scripee's prior right, and thus prevent collision and conflict. The language as to improvements was general and vague. None were required where surveyed lands were located and it is very evident that this requirement was for a minor purpose. Obviously, it was not the design of the law to compel actual, settlement or residence upon the land; for, had it been, the language would have been plain and unambiguous. This purpose was accomplished wherever the improvements were of such a character as to be notice, and their value or extent was of little consequence. That in this case they were ample as notice ought not to be questioned. The entire purpose of the act itself seems to have been to promote and secure an exchange of the interest of the mixed bloods in the reservation, which was becoming valuable for actual settlers, for certificates or scrip which would be available for the acquirement of title in fee to specific parcels of land there or elsewhere on the public domain."

On page 453, he says:

"Now, when we examine some of the provisions of the law, we are led to ask, could it have been the intention that each person to whom certificates or scrip was issued should see the land in person, upon which each piece was to be located, or should, in person see the improvements or claim the same for personal use, or be directly (that is personally) connected with either or both? Under this law the President was authorized to do what was actualy done, issue to each person entitled several pieces of scrip, of different sizes and acre-

age. Was it expected that each of these persons should be personally connected with the several and separate improvements required to be made, if all the pieces were located on unsurveyed land, and would have to claim the same for personal use? Surely not. This law contemplated and there were actually issued several pieces of scrip each to a large number of minors. Babes in arms were held to be entitled, and to them scrip was issued, and in many cases located before the minors reached their majority, as might reasonably be expected. With these facts before us, can it be held that congress thought or intended that these minors would be required, by a construction of the law, personally to supervise the selection of from three to five tracts of land on which to locate their pieces of scrip, or that they would have to be directly connected with each of these locations, or in case unsurveyed lands were desired, they would have to claim the necessary improvements as their own? In other words, do not these facts indicate, to a moral certainty, that it never occurred to the members of congress that the construction placed on this law by the Secretary would be given to it at any time,—much less after thirty years of a wholly different construction? And a construction, also which received judicial recognition and approval. See Gilbert vs. Thompson, *supra;* Hope vs. Stone, 10 Minn., 114 (141); Marks vs. Dickson, 20 How., 501. ******** The act itself never required that the improvements should be of a certain kind or value, or that the scripee should be directly connected with the land. It quite conclusively appears to the contrary, when we consider the facts before referred to, unless we take the position that the legislative branch of the gen-

eral government intended to confer upon the mixed bloods, in exchange for their interest in the reservation, scrip which would be of no value unless the recipients made personal selections, were directly connected with the locations and improvements and made claim to both for their own use and benefit."

Mr. Justice Collins has sat for many years upon the supreme bench of Minnesota, and for many years prior thereto, upon the district bench of one of the central districts of the state, and for years before that was a member of the legislative bodies of the state. He has been familiar with the course of business tranactions, with judicial determinations and with departmental construction upon matters involving this law from the very beginning.

Here then is contemporaneous construction of the Department; contemporaneous judicial construction by the Supreme Court of Minnesota contained in the decision of Judge Atwater referred to; by subsequent cases, as in the case of Hope vs. Stone, 10 Minn., 114, and the case of Gilbert vs. Thompson, 14 Minn., decided by Chief Justice Gilfillan, who ranked favorably with any state supreme court judge, the whole course of which is admirably summed up by Mr. Justice Collins in the decision in this case.

These decisions show what the act itself shows, that there was no disposition on the part of Congress to impress the provisions of this act with the requirements of the homestead or pre-emption laws,

or that its application and construction should be governed by the controlling principles of these laws. In the very act itself the word "exchange" is used. It operated to effect an "exchange" of the lands. That which, according to Secretary Vilas' own language, governed and controlled him in reaching his decision is thus shown to be an entirely erroneous view. The construction thus placed upon the law, and what was done by the government to put it into effect, conclusively shows that it was not intended to be required by the act that the half-breed should necessarily have personal contact with the land, personal supervision and direction of the improvements to be made, but that they might be made by an agent or attorney, or that the matter of improvements was of prime importance, or had any other purpose than the mere serving of notice to intending settlers to avoid conflict. To such sources as these, and to such old and experienced lawyers and jurists as these, we prefer to look for a proper construction of the law, rather than to the learned counsel for the plaintiff in error who had not yet been born when this construction of the law began, and who had not turned his face westward until after this settled construction of this act had been undisturbed and unquestioned for a quarter of a century. Therefore, that, which by the terms of the law was secured to the half-breed without restriction, by the erroneous construction thereof by the Secretary was denied him; by which reversal of previous construction, rights which had become vested, titles

which had become settled, were to be over-turned and brought into question. The title of farms, whole towns and villages, and valuable mines held with confident security under the terms of this act and the construction which had been placed upon it, as well as the title to the land in question which is conceded to be of considerable value, was assailed by this decision resting upon departmental requirements which were unauthorized by the act, and which, during the period of time within which most of this scrip was located, would have been of almost absolutely impossible compliance.

On the subject of the improvements and the personal supervision of the making thereof, the right to make the same by attorney or agent, on the subject of the purpose of the act and the requisites to a valid location, and on the subject of the matter of personal contact with the land and of taking the same for the personal use of the scripee, therefore, the decision of the Secretary is entirely erroneous subversive of the rights of the scrip holders, contrary to the act and its evident intent, and to the long continued construction thereof.

The law did not require that the half-breed should take the land for his own use and benefit but gave him the right to have the land to do with as he pleased, without restriction, and under all judicial authority that can be cited on the subject, he could sell it as soon as he pleased after location and could contract to sell it even before he got it.

What one may do in his own right, unless some good reason exists to the contrary, he may also do

by another acting as his agent for the purpose. Such has been the common law from time immemorial. It seems to be a ridiculous and senseless proposition to hold that the half-breed must construct the improvements with his own hands or must sit by and watch another do it under his direction, when it is held he could employ an agent to effect the location. A statute in derogation of the common law is to be strictly construed.

Shaw vs. Ry. Co., 101 U. S., 557.

No more will a construction in derogation of the common law be upheld unless the intent clearly appears.

It is not to be presumed that the legislature intends by the language of its enactments to impress any new, strained or unusual meaning upon the terms used. This is a familiar rule of statutory construction.

The decision of Mr. Sparks, the Commissioner of the General Land Office as before stated, turned this incidental and wholly unimportant provision, designed, not to protect the government, but to prevent conflict, into the vital and all important question in the procedure, by which the land might be obtained and held adversely to the scrip claimant, because the half-breed had not been shown to have had personal and direct contact with the land and the improvements, and the Secretary said he concurred in the view expressed by the Commissioner. (See Sec'y Vilas' decision, Fol. 213 Transcript.)

In order to give this interpretation to the law, there had to be read into the statute things not there and for which no good reason could be given for their not being there if congress had so desired and intended. At this day it needs no argument to enforce the contention to this court that conditions and provisions wholly unauthorized by a law cannot be read into it by the Secretary of the Interior in enlargement thereof or in restriction of the grants thereby made.

This court, in the exercise of its judicial power, will determine, without being hampered by this new construction of the Secretary whether the statute bears any such interpretation as given it.

Webster vs. Luther, 163 U. S., 331.

In that case a construction with much reason had for years been placed by the land department upon the law providing for soldiers' additional homesteads, construing the same as a part of the homestead laws and hence subject to the restrictions and requirements contained in such laws, but the court over-ruled it because in the view of the court the statute did not warrant it or justify the conditions and restrictions imposed by the Department by virtue of its construction of the law. (See last paragraph of the decision.)

Neither can it be claimed that any different construction should be put upon the law because the parties affected were half-breeds or mixed bloods, by virtue of any special solicitude for them

or paternalism to be exercised in their behalf by the government. If such was the intention of congress, why should it not have imposed like requirements as to surveyed lands as to which it is not even claim- that it was necessary that any improvements whatever be made or that the half-breed should ever see the land. As we shall see in our discussion of alienation, the court will not consider that because a person is a half-breed any different presumption should be raised in his behalf or, any different rule of statutory construction invoked.

Upon the only reason assigned by the Commissioner and which was approved by the Secretary in the decision by which these parties were deprived of this land, the decision was clearly wrong and rests upon a wholly erroneous construction of the Act of 1854, and it is within the power and duty of the courts to correct it.

The land department is full of cases where Sioux half-breed scrip locations have gone to patent without any notice whatever having been taken of the matter of improvements, and that too where the scrip was first located upon unsurveyed lands; and where there have not been adverse claims intervening, no importance whatever seems to have attached to the matter of improvements. As a result of an examination made in the land department on this question, we have been furnished with references to a multitude of cases which verifiy the above statement, but it does not seem to us profitable to here enumerate them.

While considering the construction placed upon the law and the requirements imposed by the Secretary with reference to improvements, to the personal supervision thereof and to personal contact with the land by the half-breed, in passing we might call attention to the finding of Secretary Vilas to the effect that "slight improvements, scarcely worthy of the name, were made upon the premises." We have claimed in respect to this, that such a finding was wholly unwarranted by the record, and that he seems to have gone out of his way to inject this finding into the case, and we have the right to presume that because he so found, is one of the reasons, or perhaps, more correctly speaking, one of the apologies for his decision in this case.

In the first place we invite the attention of the court to the record. The evidence shows that two log houses were built upon the claims, 14 by 16 feet and a story and a half high. They were provided with a door and a window of the same character as was usual in case of pre-emption and homestead claims in this district. Some land was cleared, lines were run with care and stakes set. Does anyone claim anywhere in this record that they were not apprised of these scrip locations by reason of these improvements? Not at all. It is frankly admitted upon the record that all parties had knowledge of the rights and claims of the scrip claimants. The fact that the parties who went into a conspiracy to try to deprive these claimants of the lands, undertook to discredit the extent of the improve-

ments and undertook to hire a surveyor to try to show that the lines were not correctly laid, all goes to show that these improvements served most effectually the only purpose for which the law required them.

Again, what right had the Secretary to criticize the extent of the improvements? The law fixed no minimum limit upon its requirements. It did not require the building of a house at all; it did not require residence; it did not require occupancy. Clearly the Secretary of the Interior was too exacting in this decision, more so than the law required. These log houses, or shanties if you may so choose to call them, might not be proper decorations for metropolitan streets, but in that distant section of the country, it was no small undertaking to build them, and they were doubtless quite as good as if the half-breed herself had chopped down the logs and built the habitation, which seems to have been the Secretary's idea of the requirement.

It is conceded that the beneficiaries of this scrip could act by agent in locating it. Indeed they had so acted for more than a quarter of a century. If so, can any good reason be tendered why they could not act by agent in making the improvements necessary to mark the fact and extent of such location? If so, then again the Secretary of the Interior erred in holding that they were not made by or for the benefit of the scripee, if they were made in support of ther entry and location, and by her authority, or at

the instance of the agent who was authorized "to do all acts necessary to effect and secure a permanent location of the scrip."

We invite the attention of the court to the exhaustive and convincing memorandum filed by the learned trial judge. (Pages 275 to 301, Transcript.) And at this particular juncture, we call special attention to his discussion of the requirements of improvements on unsurveyed lands and his conclusion that an agent could make the improvements necessary to effect location as well as the reservee, and that it being but an incident to the consummation of the location, the power to locate embraced the power to make the improvements. That if it had been the purpose of congress to make a settler out of the half-breed, clearly it would have applied with equal force to locations on surveyed lands. (See Fol. 842-848, Transcript.) Also the clear and vigorous expression of the Supreme Court of Minnesota on these same questions in affirming the decision of the trial court in this case. (Pages 330 et seq. Transcript, 79 Minn., 442.)

We are unable to appreciate the force of the argument for the appellant made in the Supreme Court of our state against this reasoning of the trial court, wherein its counsel said (page 101 of his brief in that court:) "It requires but little consideration to convince one that this is an entirely erroneous view." He then says: "The whole purpose of the act of congress as shown by the legislative history of the act, the known habits of the Indian, the language itself and the general policy of the

government with reference to its public lands, conclusively shows that the whole object was to protect *the half-breed who had gone beyond the limits of the reservation and settled upon unsurveyed lands.*"

The counsel then cited the decision in Felix vs. Carroll, (which will be found in full in an appendix to Mr. Harris' brief,) where Judge Otto held that it was only in case of unsurveyed lands that improvements were required as an antecedent to right of location, but what benefit that decision is to plaintiff's contention is not discernable. Where in the act is there any limitation that only such unsurveyed lands could be taken as the Indian had at the time of its passage settled upon? It has always been held that under this scrip, at any time no matter how long since, unsurveyed lands could be taken. The language of the act itself and every construction ever put upon it by the Department or by the courts or even by Mr. Secretary Vilas, import no other meaning than that at any time unsurveyed lands could be taken under the scrip; no requirement of residence or settlement can be read into it, and it was not limited to occupants of unsurveyed lands at the time of the passage of the act.

What explanation can be made then of the fact that if the purpose of congress was to make a settler of the half-breed and put him upon the basis of a pre-emptor, that it required improvements upon unsurveyed lands only and as to surveyed lands required no improvements whatever, or even that the half-breed should ever see the land?

We have listened in vain for any answer to this question. If the government intended to continue a guardianship over the half-breed in the issuance of this scrip, the purpose to do so is not disclosed in this act.

Counsel has heretofore argued that the right of pre-emption settlement was extended to Minnesota by the Act of August 4th, 1854, which authorized settlement to be made upon surveyed or unsurveyed lands, but that the right of pre-emption settlement upon unsurveyed lands generally was not authorized until the Actof June 2nd, 1862, 12 Statutes at Large, 413; that the Homestead Act of 1862, did not authorize settlement upon unsurveyed lands and that it was not until the Act of May 14th, 1880, that homestead settlement upon unsurveyed land was recognized, and hence that settlement upon unsurveyed lands could not be made, and that, therefore, the requirement of improvements in the Act of July 17th, 1854, could not have been to prevent conflict, and that the reasoning of the trial court is necessarily erroneous.

Let us see if counsel's contention is well founded. In the first place, let it be noted that the half-breed under this act was not limited to Minnesota; he could go anywhere and locate upon government land, surveyed or unsurveyed, where it was not taken or reserved.

It had been the policy of the government for many years prior to the Act of July 17th, 1854, to

recognize the rights of settlers upon unsurveyed lands.

July 14th, 1832, 4 U. S. Statutes, 603, congress passed an act supplemental to the old pre-emption Act of 1830, providing that parties entitled to a pre-emption, according to the provisions of the Act of May 29th, 1830, "who have not been or shall not be" enabled to make proof and enter the land in consequence of public surveys not having been made, should be permitted to enter the said lands on the same conditions in every respect as prescribed in that act, within one year after the surveys were made.

A further similar act intended to enlarge the provision, was passed March 2nd, 1833, 4 U. S. Statutes, 663. By implication the right was recognized in an act passed June 22, 1838, granting pre-emption rights to settlers on public lands, 5 Statutes at Large, 251; and in an act supplemental to this act, passed June 1st, 1840, (5 Stats. at Large, 382), the rights of such settlers on unsurveyed lands were protected where the land, when surveyed, turned out to be set apart for the support of schools, and authorized the taking of other land in lieu thereof. The pre-emption act of September 4, 1841 (4 U. S. Stats., page 453), was of general application to all public lands to which the Indian title should have been, at the time of settlement, extinguished. It applied to Minnesota as well as elsewhere. It did not specifically provide for settlement upon unsurveyed lands, but by an act of

March 3rd, 1843, (5 U. S. Stats., page 620, Sec. 3), settlers upon unsurveyed lands in certain cases where the location proved after surveys were made to be on lands reserved for schools, were given credit for their settlement and allowed to take other lands at a minimum price.

There were numerous laws applicable to certain states and territories in the United States which permitted settlement to be made on unsurveyed lands, and Section 7 of the Act of May 30, 1862, (12 Stats. at Large, 410) provided "that in regard to settlements which by existing laws are authorized in certain states and territories upon unsurveyed lands," a declaratory statement should be filed within three months from the date of the receipt at the district land office, with the approved plat of the township embracing such pre-emption settlement.

The Act of February 26th, 1859, found in the 11 Stats. at Large, 385, provided that where settlement with a view to pre-emption had been made before the survey of the lands in the field which should be found to have been made on Sections 16 and 36, said sections should be subject to pre-emption claim of the settler, and that if such sections had been reserved or pledged for the use of schools or colleges in the state or territory in which the lands lie, other lands of like quantity were thereby appropriated in lieu of such as may be patented by pre-emptors.

It is true that an act was passed August 4th, 1854, three weeks after the passage of the Sioux

half-breed act, specifically making the pre-emption law of 1841 applicable to all unsurveyed lands in the State of Minnesota. It had theretofore been applicable to all surveyed lands, and even a cursory examination of the acts of congress shows that it has been the continued policy, from a time long antedating the passage of the Sioux half-breed act, to protect settlers upon unsurveyed lands. Without doubt this act was pending in congress before the act of July 17 was passed. This must, then, have been in the mind of congress, and instead of an examination of these acts showing that the reasoning of the court is necesarily wrong, such examination argues conclusively for the correctness of the view of the trial court as expressed in the memorandum, and such view, we have seen, is in accord with the view of the Hon. Thomas A. Hendricks when, as Commissioner of the General Land Office, he issued the circular of instructions of March 21st, 1857, herein before referred to and quoted from.

The counsel for the plaintiff in error in his brief in the Supreme Court of Minnesota, wrote a chapter of three pages (commencing on page 18), which he called the "legislative history" of this act. It consisted of little more than a quotation from a report made March 4, 1854, by Mr. Geo. W. Manypenny, Commissioner of Indian Affairs, and a few excerpts from some remarks made in the house of representatives by Mr. Wright who was a member of the committee on Indian affairs. He made the following quotation from Mr. Manypenny:

"The Indian titles to the whole of the country surrounding said reservation are now extinguished, and the bands to which said surrounding country belonged have removed westward, and many of the less cultivated of said half-breeds are desirous of disposing of their interest in said reserve and following their Indian relatives. Some have already gone. Justice, humanity and sound policy alike second their desire; for all experience demonstrates the utter incompatibilty of the uncivilized Indian with civilized life. Many of them, however, are represented as being educated, and having judgment and experience sufficient to take care of their own interest. A number of them are said to be men of much intelligence, possessing property, and having become citizens of Minnesota and the adjoining states. Some of them have served in the legislature and filled offices of honor and trust in the Territory, while others are engaged in agriculture, mercantile and other profitable pursuits. With them, at least the object of the fostering policy of the government has been attained, in fitting them for civilized life; for in point of intelligence and civilization many of them would compare favorably with their white brethren."

We do not know whether counsel will care to reproduce this matter again, but it is quite difficult to see how it in any manner assists the construction placed by him and the Secretary upon this law. As seen above, he quoted Mr. Manypenny as saying that the less cultivated of the half-breeds were desirous of disposing of their interests in the reservation and following their Indian relatives. In other words, preferred tribal life. And further quoted him as

saying that all experience demonstrates the utter incompatibility of the uncivilzed Indian with civilized life.

Evidently, then, it was scarcely expected to make farmers and pre-emptors out of these. Mr. Manypenny further says that some were men of much intelligence, possessing property, having become citizens of Minnesota and other states, some had served in the legislature and held other offices of trust and some were engaged in business, and that the fostering policy as to these had been attained and that in point of intelligence and civilization they would compare favorably with their white brethren. Certainly then the government had no need to preserve a guardianship over these and put any restraint upon them in the management and disposition of the land which it agreed to give them. If a portion of the half-breeds desired to join their tribal relatives and others had become men of business and affairs, in these conditions alone may be found the reasons why congress did not see fit to place any restriction upon the alienation of the land, or require residence thereon or any personal contact therewith, either as to those who had bought lands for themselves elsewhere or were engaged in business, or those who did not want to sever tribal relations; and even in these very things in part may be found the reasons why congress determined that scrip without restrictions, save that it should not be assignable, was best applicable to all classes of half-breeds and best calculated to give them the greatest financial return for their lands.

So far as the excerpts from Mr. Wright's remarks are concerned, the same are not applicable to the act as passed, and his remarks would hardly be controlling in the face of the provisions of the act itself. The court will look to the act in order to determine its intent. The intent of the law is the intent expressed in the statute. If the words of the act are free from ambiguity and express plainly and definitely the sense of the framers, there is no need to resort to other means of interpretation. The statute itself furnishes the best means of its own exposition. If the sense in which words were intended to be used can be clearly ascertained from the provisions, the intention thus indicated will prevail without resorting to other means of aiding in the construction.

Sutherland on Statutory Construction, Sections 236, 237, 238 and 239: "If the legislature has expressed its intention in the law itself, with certainty, it is not admissable to depart from that intention on any extraneous consideration of the theory of construction."

Section 236, Sutherland on Stat. Const.
Denn vs. Reid, 10 Peters, 524.
McCluskey vs. Cromwell, 11 N. Y., 601.
Bank vs. Colgate, 120 N. Y., 381 at 393.
People ex rel Bocher vs. Wemple, 115 N. Y., 308.
Sturgess vs. Crowninshield, 4 Wheat., 202.
United States vs. Hartwell, 6 Wall., 385.

Counsel referred to Blake vs. Bank, 90 U. S., 307, and the Chinese Exclusion case, 130 U. S., 581, to the point that courts resort to public documents and journals of congress for the purpose of ascertaining the legislative history of an act for aid in its construction.

Blake vs. Nat'l City Bank, 90 U. S., 307, was a case where there was an ambiguity and contradiction on the face of the act. The proceedings in congress were examined to ascertain the intent of the act.

In the Chinese exclusion case there was no ambiguity in the law; the court merely took up the history of the various treaties between China and the United States and the legislation to carry them into effect for the purpose of presenting with greater clearness the matter of the objections to the constitutionality of the law.

Congress has passed many laws relative to rights in unsurveyed public lands. It has passed many laws relative to Indians. The question here is not what congress might have put into law, nor what it has put into other laws, but what it put into this law.

It made no provision for residence or settlement; it made no requirement as to the extent or character of the improvements. It simply required some improvements when unsurveyed land was taken. There is then no reason to read anything else into the act, nor to hunt in a waste basket for means of interpretation. Congress has not found it difficult to make plain and distinct provisions for settle-

ment and residence, or to specify restrictions upon the acquisition of public lands for the personal use and benefit of the applicant, whether Indian or white, when it desired so to do, or to place restrictions upon alienation, or to prohibit the seizure of the lands to satisfy debts previously contracted.

It is not difficult to see why it did none of these in this act. But we need not hunt for reasons. It did not incorporate such provisions in it. The attempt to resort to other land laws, the appeal to the alleged policy of the government toward the Indian are but evidences of the weakness of the plaintiff's contention that any such requirements as seem to have had such controlling influence with Mr. Secretary Vilas can be found authorized by the act itself.

The act, then, was at the same time a law and a contract. In and by its very terms it provided for an "exchange" of lands; it gave land for land; it authorized the issuance and delivery of scrip which when laid upon a particular tract operated to vest the ownership of that tract in the scripee, whether a legal title or only an equitable one, it matters not; either is sufficient for our purpose. The act was also wanting, we assert, in any provision restricting the alienation of the land, but we will make this matter of restriction upon the alienation of the land the subject of the next brief succeeding chapter, leaving any further or more full discussion of that branch of the case to Mr. Harris, counsel for other defendants in error.

III.

There is no Restriction in the Act upon Alienation of the Land; There was Nothing to Prevent the Half-breed From Conveying the Land as Soon as Entered, nor to Contract its Conveyance Even Before Entry; or Before its Location to Authorize Another to Convey it as soon as Obtained.

The only restriction in the act was "No transfer or conveyance of any of said certificates or scrip shall be valid." We believe it is claimed by the plaintiff in error's counsel that this is more than a prohibition against the assignment of the scrip or certificate and was intended to operate as a prohibition against the alienation of the land, prior to location, and, as we understood him to say upon the trial, until after the patent had issued. We submit the provision bears no such construction. Congress has never found it difficult to find appropriate language by which to restrict the alienation of land, when it wished to enact such a law. This act provided no restriction upon the alienation of the land. It is admitted by the Department even, that the half-breed could convey the land as soon as the scrip was located, without waiting for patent to issue.

See Secretary Vilas' language in Allen vs. Merrill, 8 L. D., 217, as follows: "When the location is

made, if validly made, the title vests at once in the person to whom the scrip was issued."

The government got land from the half-breed and agreed by the scrip to give him other land instead. It got the land without restriction; it gave him land without restriction. It did not require him to live upon it; it did not give it to him to make a home upon, unless he saw fit to devote it to that purpose. It did not indicate any purpose to follow him with any tutelage or guardianship over him in his method of dealing with the same. If the government intended to exercise any guardianship, it would be more in line with such policy, that it should try to make the right given with such certificates as valuable as possible, and not impose restrictions upon the alienation of the land to decrease its value.

The Act of 1854, was a contract as well as a law. It agreed to give land for land, and no purpose is evinced to vest any less estate in the beneficiary because he was a half-breed. No purpose was evinced to vest in him any modified estate or to restrict him in the full enjoyment, use or power of alienation of his land.

So far as the grant without restrictions was concerned, the consideration for which had been received by the government at the time of issuing the certificates or scrip, it was as absolute in all particulars as the grant or reservation to Chief Pet-chi-co involved in the case of Doe vs. Wilson, 23 How., 457, or the Indian chiefs in Jones vs. Meehan, 175 U. S.,

1, or to Francis Besion in Crewes vs. Burcham, 66 U. S., 352. The delivery of the certificates made the individual right without restrictions complete. The taking and selection of the particular tract desired which could be done concededly in person or by agent, was all that remained. No restrictions existed unless they are to be implied.

In Webster vs. Luther, 163 U. S., 331, L. Ed. Book 41, page 179, the Supreme Court of the United States, in relation to additional homesteads said:

> "Any restriction upon its alienation must decrease its value. We are unable to find anything in the acts of congress or in the dictates of an enlightened policy that requires the imposition of any such restraint. On the other hand, the general rule of law which discourages all restraints upon alienation, the marked contrasts between the purposes and the provisions of the grant of the right of the original homestead and the purposes and provisions of the grant of the right to the additional land ******leaves us without doubt that the assignment before entry of the right to this additional land granted by the U. S. Rev. Stat., No. 2306, contravenes no public policy of the nation, violates no statute and is valid as against the assignor, his heirs and assigns."

In Poirier vs. Barnes, 57 Fed., 956, the Circuit Court of Appeals said:

> "The beneficiary was left free to select this additional land from any portion of the vast public domain described in the act, and free to apply it to any beneficial use that he chose. It

was an unfettered gift in the nature of compensation for past services******The presumption is that congress intended to make this right as valuable as possible."

Restrictions upon alienation are not favored by the law and are not implied. It requires a clear provision restraining or prohibiting alienation of the land in order to give such an effect to the law.

Camp vs. Smth, 2 Minn., 142.
Dole vs. Wilson, 20 Minn., 356.
Townsend vs. Fenton, 30 Minn., 530.
Myers vs. Croft, 13 Wall., 291.
Maxwell vs. Moore, 22 How., 185.
Threadgill vs. Pintard, 12 How., 15.
Doe vs. Wilson, 23 How., 458.
Lamb vs. Davenport, 18 Wall., 307.
Webster vs. Luther, 163 U. S., 331.

The fact that the government saw fit to make the scrip, as such, non-assignable, does not operate to prevent the beneficiary before location from making an agreement or giving power to convey the land when the scrip shall have been located and the land entered.

This is illustrated by the foregoing decisions, to which may be added the following:

Gilbert vs. Thompson, 14 Minn., 544.
Knight vs. Leary, 54 Wis., 459.

Mr. Justice Collins in the decision in this case

states the matter clearly and concisely when he says: (79 Minn., 452, Folio 359 Transcript.)

> "It was proposed to compensate the mixed bloods, who surrendered their rights or claims under the treaty, in a manner which would be of some value, and it has been held that the fact that the government saw fit to make the scrip, as such, non-assignable, does not operate to prevent the beneficiary from making an agreement before location, or giving power to convey the land when the scrip shall have been located and the land entered. We need not cite decisions in support of this proposition for they are abundant—federal and state. Nor need we stop to consider why congress saw fit to declare that the scrip should not be assignable, and yet failed to deprive the scripee of the power of alienation immediately after the location, and in pursuance of a bargain previously made. It is enough to know that the prohibition related solely to assignments of the scrip itself."

Secretary Vilas held that the government intended to express "the same general idea" as in homestead and pre-emption laws. He held the scripee could locate by agent or attorney. Necessarily, therefore, in case of surveyed land, she need not do a single thing except what the agent could do, but in this case he held that by agent or attorney she could not make the improvements necessary to effect a location of unsurveyed lands; that they must be made by her in person or under her personal supervision and for her personal benefit; that to act through agents and attorneys to procure the

land and to sell it when procured was void *because it was an attempt to sell the scrip* and hence within the prohibition. If the beneficiary was sick, infirm or a minor of tender age, then by this construction, the benefits of the act are nullified.

The above holding is all the more surprising in the light of his admission in Allen vs. Merrill, 8 L. D., 219, that the improvements could be made by agent if intended for her enjoyment.

Without quoting at length from the various authorities above cited, we urge with the greatest confidence that the only prohibtion contained in this statute, relative to alienation, was the simple one that the scrip should not be assigned. It could not be located except in the name of the scripee. What then was the purpose of the government in making this provision? Clearly it was not for the purpose of exercising a guardianship over the Indian or half-breed, for none of the provisions of the act indicate any inten to exercise such guardianship. None of the provisions of the act indicate any intent to deprive the Indian or half-breed of the full benefits and advantages of the right of alienation of his land after location. None of the provisions of the act indicate that the government held toward the half-breed any such view as that he was unable to deal intelligently with his land, or to obtain a proper price for it, or to withhold any power to sell or dispose of it as soon as it had been located. He was not restricted to obtain it for his personal use and benefit, and

counsel has quoted from the Commissioner of Indian affairs to show that some of the beneficiaries wished to continue tribal relations, while others had come to be men of affairs. Hence it seems to us that no consistent argument can be made on the ground that it was on account of any special solicitude on behalf of the half-breed that the scrip was made non-assignable, nor that it was purposed to quarter him upon the lands which might be taken under this scrip.

When purposes of settlement were sought to be enforced, the government has seen fit to impose restrictions upon the white man with reference to alienation; when such purposes were not sought, it has been held that no reason exists for interpolating into the policy of the law such restrictions. Here no residence was required, no improvements even were required of any kind whatsoever when the land was surveyed, yet it is argued that a different rule of construction should be adopted because the beneficiaries were half-breeds. We are yet to be advised of any substantial authority cited on that proposition.

Mr. Justice Brewer, in the case of Felix vs. Patrick, reported in the 36 Fed. 457, has expressed himself quite clearly upon this subject. On page 461 he says:

> "But it is erroneously contended that a different rule should be applied in this case because the plaintiff and his ancestors were Indians; that the law is very tender in respect to the rights of such persons, who are not familiar

with our laws and methods of transacting governmental or private business, and were ignorant of the disposition which had been made of the scrip. And it is also urged that as Indians they were the wards of the government and could not have asserted their rights to the property, even if they had known what their rights were. It is not shown that they were not persons of education and intelligence, or that they were not in fact familiar with the land laws and the methods of governmental business, or that they were not in fact as competent to look after their rights as any person. We all know that many of these Indians, especially the half-breeds, are well educated, intelligent and as fully competent to look after their business as any persons; and the fact that they were Indians and maintaining tribal relations and were in a certain sense the wards of the government, did not debar them from a hearing in the courts of Nebraska."

We do not know that it devolves upon us to assign a reason for congress declaring that the scrip as such should not be assignable and should not pass by transfer with the freedom of personal property, but we do not think it difficult to assign such a reason. We believe that the reason assigned by our associate Mr. L. C. Harris, is the most satisfactory one which can be given, viz: That it was done in order to protect the government and to avoid entailing upon the government the risk of forgeries in transfers or of conflict over the transfers; that the government intended to keep its contract to give the scripees the land and that it would issue its evi-

dences of title to the scripee and leave the courts to determine any questions which might arise over the ownership of the lands by any transfers which might be made. This simplified the work of the government in the distribution of the land and left to the land department that which was more properly within its province and relegated to the courts that which belonged to them. Counsel argues this could not be the reason because in some other scrips more numerous than this, the government had not made this restriction. Perhaps its experience conduced to placing the restriction in this act. There were about 3500 pieces of the scrip. It was so provided that the half-breed could freely alienate and contract for the alienation of the land, and it was assuredly seen that he would do so. The land being given in exchange for land the provision for location by means of scrip was simple and speedy. The government was interested only that when it gave the land the scrip should be properly satisfied. It agreed to give the land in satisfaction of the scrip; it agreed to give it to the scripee and when it had done this it was not interested in the contentions of private parties and did not propose to interest itself in such contentions or meddle with the subject of transfers.

The case of Walter Bourke in 12 L. D., 108, indicates that Secretary Noble at that time must have held the same view. Had the government had any other purpose in view or had it had in view the purpose of exercising a guardianship over the beneficiary of the scrip, it provided indeed most meager

measures to accomplish it. There is a total absence in the act of any indication to treat the beneficiaries under this scrip with any less or greater consideration, or to deal with them as being of any less capacity than it has in various enactments in the case of white persons.

An examination of the various Indian treaties and the laws pertaining to the public lands is instructive as showing that to both Indians and whites, congress has at times imposed restrictions, at others, not; and the courts have ever held and must continue to hold that where no restrictions are imposed by the law, it will not be implied that any were intended, and the departmental officers cannot add provisions by their construction, either in enlargement or restriction of the law itself.

Mr. Harris, counsel for the other defendants in error, will doubtless carry the discussion under this head to a much greater extent, and has heretofore made a very interesting and instructive collation of the provisions contained in various Indian treaties, illustrative of the intent of the government in different cases and under different circumstances, and of various cases showing the construction placed thereon by the courts, and on that account, as well as because in our view there can be no serious question about the construction of the law in this regard, we do not desire further to prolong this chapter.

IV.

The Record shows the Scrip was located in good Faith and in Accordance with the Accepted Practice, for the Purpose of Obtaining the Land in the Name of the Scripee in Satisfaction of the Scrip and for Her and her Assigns. The Land in Question was Segregated from the Public Domain and validly Appropriated by the Location of the Scrip. If the Scrip was Properly Located, no other Act done or in Contemplation Concerning the Land or the Sale or Conveyance thereof could in any Manner Affect the Validity of the Location.

The record does not show an assignment of the scrip or any attempt to assign the same. It does not show any act intended to defraud either the government or the scripee, or which worked any fraud upon either the government or the scripee. Absence of fraud was freely conceded upon the trial by the plaintiff. It does not show any attempt to get the land in any other way except in satisfaction of the scrip and in the name of the scripee, and with what the scripee got out of the land or by means of the location of the land in her name, and her conveyance thereof, the government was and is in no manner concerned. We admit that the record shows

that Frank W. Eaton desired to obtain an interest in the land, but aver that the record shows that he desired to obtain such interest through Orillie Stram, by the legitimate surrender by her to the government therefor of her scrip, and by conveyance from her. To that end he dealt with her through the mutual agency of one Smith. The result of the negotiations was that he was duly empowered to locate the scrip and to do all things necessary "to perfect and secure a permanent and bona fide location" thereof.

Suppose Orillie Stram had been told that if she entered this land with her scrip she could sell it for $5,000; suppose she had actually agreed with Eaton, or anybody else, to sell it for that after it was entered, would that be any bar to her location of the scrip upon the land? Most certainly not. It is held, even by Secretary Vilas, that she might locate the same by attorney or agent. She had a right to appoint an agent. She had a right to appoint Eaton. She had a right to deliver the power of attorney to Eaton, either directly or through her agent Mr. Smith, with the donee's name left blank, for the purpose of having the entry made and her scrip surrendered to the government. Whatever transaction she made about selling the land, was her concern.

Notwithstanding the fraudulent practice committed in the interest of the attempted pre-emption filing of Hyde to have her disavow Eaton's authority, she confirmed his appointment and his acts.

No rights of any other persons attached in the interim.

Eaton did not buy the scrip nor take an assignment of it. He was not dealing in the scrip for speculation. He did not want to buy the scrip that he might sell it again. His transaction was directed to the land. He wished that the right under the scrip might be exercised, that the scrip might be located upon the land to the end that for such considerations as might be or were satisfactory to Orillie Stram (with which the government had nothing to do) the land might be obtained through her. Orillie Stram was then interested in the location; the scrip continued to be hers; it always had to continue to be hers until extinguished. The consideration to her depended in whole or in part upon its location. The receipt of any benefits by Eaton, or any other parties, depended absolutely upon its location upon land.

See testimony of Eaton, Folios 324, 332, 336, 337, 339, 340, Transcript.

At Folio 337 on cross-examination, Eaton testified:

"Q. Who did you pay?

"A. I made the first payment to Byron M. Smith, and paid the balance to Orillie Stram March 31st, 1886. I made no payment to her until then. I had agreed to pay her previous to that time. I made the agreement at the time the papers were obtained from Byron M. Smith."

At folio 339 of the Transcript he says, refer-

ring to Byron M. Smith of Minneapolis: "He acted for me and for her. He held her scrip and got new powers of attorney and made the arrangements."

At folio 340 he says he was to pay Mrs. Stram after the location was perfected and the scrip adjusted.

Let it be noted that Merritt, acting as attorney to convey the property, made conveyances of it and that the deed of confirmation afterward executed by the Strams also confirmed all Merritt's acts under his power of attorney. It cannot be denied that Eaton desired to obtain an interest in the land, but we assert that he took no means of doing so that in any manner conflicted with the law or the accepted practice, and the local officers, with full knowledge of the powers of attorney, and all acts done by Eaton, expressly held that the entry was effected in accordance with the usual accepted practice and in acordance with law. (Folio 198, Transcript.)

No subsequent rule, decision or practice of the Department could divest the scripee of the property secured by that entry or deprive her of the equitable or legal right to the title to the land which was thereby secured; her rights became vested at that time under the law and the rules of practice theretofore and then in force.

Belden vs. Midway Co., 107 Fed. Rep., 602.

The fact that the name of the donee was not fill-

ed in in the power of attorney until it was delivered, was of no consequence, if such was the fact. This has repeatedly been held to be of no importance both by the Department and by the courts. For example, see

McDonald vs. Hartmann, 10 L. D., 563.
Hartmann vs. Warren, 19 L. D., 65.
Allen vs. Withrow, 110 U. S., 119.

The government was not defrauded or injured; the half-breed was not defrauded or injured and had said so by her solemn deed after the transactions were completed. There were no intervening rights of other parties. We confidently assert that, as we proceed with the examination of the law and authorities, it will appear that the findings of the local officers were fully justified.

The scrip itself was unassignable. The land had to be entered in the name of the scripee. In the scrip itself the half-breed had nothing she could transfer to another, but her title to the land when perfected was as absolute as tho' acquired in any other way. Any attempt to transfer the scrip would be of no effect; the title to the scrip would remain in the half-breed. *Such attempt to transfer would involve no moral turpitude nor a breach of any legal duty as in case of the transfer of a pre-emptive right, but it simply could not be done and would be ineffectual.*

Gilbert vs. Thompson, 14 Minn., 544.

Coursolle vs. Weyerhauser, 69 Minn., 328.

Midway Co. vs. Eaton, 79 Minn., 450 and 455.

It is not disputed that the scripee could locate the same by agent or attorney. The instructions of the Department quoted at length by counsel for the plaintiff in error, specifically recognize this right.

See 4th paragraph Circular of March 21, 1857; 4th paragraph of Circular of Feb'y 22, 1864.

In the Circular of May 28, 1878, which contained numerous provisions not authorized by the law at all or warranted by its provisions, there was, notwithstanding, found this provision: "The land selected in satisfaction of a certificate or scrip, must, of course, be located in the name of the party in whose favor the scrip is issued, and the location may be made by him or her in person or by his or her guardian or duly authorized agent."

Even Secretary Vilas held that the location might be made by agent, and in Allen vs. Merrill admitted that the improvements might be made by an agent.

On page 217, 8 L. D., speaking of the use of two letters of attorney, one to locate and the other to sell, and the filing of the one to locate only with the scrip, he said: "There is nothing therefore to challenge the bona fides of the transaction, as appears on the surface, or any reason why the land office should not recognize it as a fair exercise of

the right to do by attorney what one might lawfully do by himself."

Therefore, the location including improvements when necessary by an attorney in fact or agent, even upon the authority of Secretary Vilas, must have been valid in the eyes of the Department and in accordance with the practice thereof. So far as another power of attorney authorizing the sale of the premises is concerned, that has nothing to do with this question which we are now discussing. Of course, in no event need it be filed with the land office anyway; it related only to the conveyance of the land after entry, and should and must be filed in the office of the Register of Deeds of the proper county.

On page 219 of the same decision, he said:

> "This case relates to unsurveyed land and a further limitation is imposed both to mark and restrict the personal right of the half-breed to take such land. He is required to have made improvements upon it. The theory of counsel for the scrip claimants is that the half-breed may make improvements by an agent. *This may be granted,* but the difficulty with the case is that the improvements were not made for the half-breed in any sense whatever; they were made for the supposed attorney at his expense, and with no purpose to admit the half-breed to any interest or benefit in connection with them or with the land."

Verily it does seem the Secretary got into deep water with his logic. The beneficiary of the scrip

could, according to the views expressed, locate by attorney in fact, she could sell after location, but if she gave another a power of attorney to sell the land, after it should be obtained, the location was rendered invalid. Having in the Stram case upheld the commissioner who insisted on personal supervision of the improvements and personal contact with the land on the part of the half-breed, here in this case, decided at the same time and published, while the other was not published because this case covered the same ground, he admits that the improvements, to effect a valid location could be made by an agent, but then he says the difficulty is that the improvements are not in any sense made for the half-breed and with no purpose to admit the half-breed to any interest or benefit in connection with them or with the land. That was wholly a matter of the half-breed's concern. If the improvements could be made by an agent in order to effect a valid location, and if they were so made, that was all the Secretary should have been concerned with. Why should his concern reach beyond that point, when except by the act of the half-breed herself she could not be deprived of the use of the improvements if she cared to have a personal use and enjoyment of them? It was not the concern of the government nor of the Secretary. If she did not care to have a personal use and enjoyment of them, she did not need to have the slightest intent to occupy the premises or enjoy the improvements for a single day or hour after location was effected. Anything on the part of the Secretary that went a mom-

ent beyond the matter of valid location, was unnecessary and uncalled for solicitude.

Viewed in this light, the statement was ridiculous, and not only was it so, but it was not true. The law did not require her to live upon the land or to build a house thereon; and he concedes it; it did not require her to enjoy the improvements after they were made and if she made all of the improvements herself, with her own hands, she need not have stayed to enjoy them, however much the Secretary might wish her to do so, but might never see them again. Hence the only real benefit that she would derive from the improvement, if she did not choose to make her residence there, or personally use them, was the benefit of having the land appropriated to the satisfaction of her scrip, in order that she might derive the advantage to accrue to her by way of the disposition of her land, whenever she saw fit to dispose of it. Hence in this sense, which is the only sense in which the government under this law was concerned with it ,the improvements being made in behalf of the location, for the purpose of making the location and for the purpose of completing a valid entry of the premises, she was interested in the improvements, and they were in that sense made in her behalf, no matter whether they were paid for by her or by her agent. And this must have been in accord with the departmental practice prior to the decision of Secretary Vilas for an examination in the land department of entries made under this law, to which we have referred, disclosed scores of cases where the improvements

were made by an attorney in fact, for the purpose of effectuating the entry in the name of the scripee and securing the land to be patented to her.

The Supreme Court of Minnesota on page 456 of the decision in this case says:

> "It was error to hold that under the act in question it was vital that the scripee should see the land or the improvements prior to the entry, and that the agent could act in her behalf when duly authorized, not only in selecting the land itself, but in making such improvements as would in themselves, and without regard to their value, be notice on the ground of an assertion of a prior right. It was error to hold the scripee had nothing to do with these improvements for she had empowered her attorney in fact to make them; it was error to hold the scripee must have direct connection with the land, and if by his decision that the scripee must claim the land for her own personal use, the Secretary meant that such claim must be formally made, or made in good faith, or must be established by proof other than or different from that before the land department in this particular case, he was in error."

If then there was no restriction upon the alienation of the land, if the half-breed could before its acquisition authorize its alienation after location; if the scrip was unassignable and any attempt to assign the same was free from moral turpitude but was simply ineffectual; if she could authorize another to locate the scrip and do all things necessary to effectuate the entry; if no rights of other parties

intervened or attached; if the scrip was tendered by an authorized agent, accepted by the local officers and afterwards the entry was fully ratified, how can it be said that the entry was not valid? How can it be said that the contract which the government made by means of the Act of 1854, was violated?

By the acts here done by Orillie Stram, why had not the government been put to its performance of its part of the agreement? What was there to affect the validity of the entry? The Secretary held that these acts evidenced an assignment of the scrip, a thing which the half-breed could not do. *In other words, he held that a thing which she could not do, operated to defeat a thing which she could do and which, in accord with the practice, had been actually done one year previous without any contest or conflict of interest, to the entire satisfaction of the local officers and to her own satisfaction and which operated to give her what the government had contracted to give her.*

Suppose, for illustration, Eaton wanting this land, had gone to Orillie Stram and said to her: "You hold Sioux half-breed scrip and have a right to take land under it. I have my eye on a piece of land which I would like to acquire, or acquire an interest in. You come and place your scrip upon the land and locate it and I will buy the land from you for $5,000." Suppose she agreed to this and suppose if you will they reduced the agreement to writing, and then she came personally and if the land

was already surveyed, located her scrip and the entry being allowed, then conveyed the land to Eaton. Would the transaction be good? Would Eaton's contract be a valid one if therein she had agreed to sell and convey the land after she obtained it? Under the decisions of the courts which we cite, yes; under the decision of Secretary Vilas in Allen vs. Merrill, 8 L. D., 207, which is but the same thing as his decision in this case, the whole transaction would be void.

Although Mr. Vilas, page 216, says: "There was no restriction put upon the half-breed's power of alienation of the land when it should be located," and although he says, page 220, that "the fee passed out of the United States when the location was made," yet such a transaction would fall under the ban of the decision as operating to effect an assignment to another of the scrip and the right to locate. All of the reasons which are given (see bottom p. 218 and top p. 219) commit him to that conclusion. But could there be any shadow of doubt under any intelligent construction of the law and under the decisions hereinbefore cited, that such a transaction would be absolutely valid? Why, if no settlement was required, if there was no restriction upon the alienation of the land itself, if the half-breed could sell the land at once upon location being made, if she could contract in advance for its sale, why is there anything illegal in the transaction? Is any wrong done to the United States or to the scripee? In what respect has the law been violated?

But, although the Hon. Secretary made the declarations which necessarily commit him to the conclusion that such an entry made under such circumstances would be invalid, he somewhat draws away from resting his decision upon this and retreats beneath the shadow of the improvement clause.

Now suppose Eaton had gone to Orillie Stram and said the same things as above suggested, but also said: "The land is unsurveyed, some improvements must be made upon it; I will attend to the making of the improvements for you." Suppose as a part of the deal he had agreed to pay for the improvements, if you will. These improvements, Mr. Vilas agrees (page 219) might be made by agent or attorney, and although he holds on page 220 that the title passed out of the United States upon location being made upon unsurveyed lands, and holds that there was no restriction upon alienation after location, yet he nevertheless strongly holds that these improvements must be made for her personal use and benefit and that she must have direct contact with the lands. Why so, if there was no restriction upon the alienation of the land? If no residence or occupancy was required, and there was none? Why, if she might make the improvements by agent need she therefore go upon the land at all? The improvements were made in the interest of the location. Was anything more required? Why, especially if the title passed as he says it would, upon the location being made upon unsurveyed land,

was it necessary that these improvements be made under her personal direction and supervision or for her personal use and benefit, when she could sell the land the next moment without an hour's residence upon it or an hour's enjoyment of these improvements which are so necessary to be made in his view for her own sole personal use, convenience and enjoyment?

The contention is wanting in reason or logic and has no support in law. The Secretary only assigns two reasons for his ruling:

1. That it would circumvent the law and in effect operate as an assignment of the scrip;

2. That it was in violation of the land office circular requiring personal contact with the land and he also thinks it would make the right too valuable.

But if congress put no limitation upon the lands which might be purchased with the scrip, the Secretary could not do so. He seems to think (p. 219 Allen vs. Merrill) that, aided by the white man, the scrip may thus be made to purchase more valuable lands than might be selected by the half-breed or Indian upon which to erect his tepee.

Congress knew as well as the Secretary that there were white men in this country. Because there were white men who wanted the Lake Pepin lands, it said "give up these lands and you may go anywhere in the public domain and take other lands," and the act was wanting in a single sen-

tence that required a severance of the tribal relations and the separate scattered residence of the half-breeds and mixed bloods upon the lands which might thus be taken. So the purpose of the act was not to make individual farmers out of these people. Had any such requirement been imposed, no surrender of the reservation would have been obtained by the government and there would have been no course left except either maintaining the half-breed reservation or a forcible removal of the half-breeds and mixed bloods therefrom in violation of the solemn contract of the government.

After all, to cite Allen vs. Merrill is equivalent to counsel citing the decision of the Secretary in this case, for both were rendered the same day, one not published because the other was and because the decisions were practically one and the same thing; and while he relies upon the decision we complain of and introduced it in evidence, and while we have a right to extract from it what we can in the way of admissions and concessions which cut the props from under it, yet it cannot be cited as a precedent for itself and no more can Allen vs. Merrill be deemed a precedent or legitimate authority to cite as such to the court in this case.

In the case of Felix vs. Carroll unpublished, decided in the Department of the Interior in 1862 and 1863, it was claimed that Sophia Felix did not herself make the location and that it was not made for her benefit; that the real beneficiary was not the

scripee but one Patrick who desired to obtain the land. Witnesses had testified that no such person as Felix, the scripee, was known or was in existence and that the real beneficiary was Patrick. The Commissioner held from the evidence that he deemed that the location was not made for the benefit of the scripee and was invalid. He held first that Felix was not resident upon the land and had made no improvements thereon at or before the date of location. Second, that the location of the scrip, though made in her name was not made by her in person or by her duly authorized agent for her use and benefit, but by unauthorized persons and for the use and benefit of persons having no legal interest therein.

Judge Otto, who rendered the decision as Assistant Secretary of the Interior, was probably as competent a jurist as any person who has occupied that office. He held the location to be good, overruling the Commissioner, and said:

> "It is in the cases where unsurveyed lands are claimed by a half-breed that improvements are requisite as an antecedent to the right of location, and I therefore do not regard your first objection to Felix claim as sanctioned by the law.
>
> "As to your second objection, I remark that this kind of scrip is by the law declared to be unassignable. In this case Sophia Felix has signed the application to locate her scrip. The signature must be treated by us as genuine when there is no proof to the contrary, and when she has made no complaint against the use of the scrip. The fact that the scrip was carried to the land office and the business

transacted by another person does not affect the validity of her interest in the land.

"As the certificate of location issued in her name, and the patent will issue to her, neither the register's report nor the affidavits of third parties can be admitted to establish the interest of any other person in the location.

"We could not recognize such interests if an assignment in writing was produced and duly proved to have been executed by the half-breed. Whether she could sell or did sell the land after the location of her scrip, we need not inquire, and the validity or effect of any such sale or assignment must be left to the arbitrament of the courts of law. The location is valid on its face, and the owner of the scrip so far as she is represented at all, demands the patent to issue in her name, and my decision is that she is entitled thereto."

Mr. Harris will print this decision in full as an appendix to his brief.

This case strongly enforces the proposition that neither any attempt to do an impossible thing in the way of assignment of the scrip, or any transaction or attempted transaction relating to a sale of the land could have any effect upon otherwise valid acts in the way of effecting a location. This is necessarily true for there was no forfeiture of the scrip.

The method adopted in the location of this scrip was in accord, not only with contemporaneous construction then placed upon the act, but was in accord with the uniform practice of the land department until the contention arose in this case, and we

think it may be said that such course has had judicial recognition in such cases as:

Marks vs. Dickson, 20 How., 551.
Gilbert vs. Thompson, 14 Minn., 544.
Hope vs. Stone, 10 Minn., 141 (Gil. 114).

And upon principle in other cases hereinbefore referred to.

In Hope vs. Stone the half-breed having possession of the piece of land within the reserved tract had sold it to another, conveyed it by quit claim deed and given a contract for further conveyance at a future time. The title and rights thus granted had passed by subsequent transfer prior to the passage of the Act of 1854. After the passage of the act the half-breed located the land and conveyed it pursuant to the requirement of her contract. The contention arose between subsequent grantees, based upon the claim of the invalidity of these first transfers and agreement. The court says:

> *"It is not claimed that there is any statute specifically prohibiting such transactions or by which they are expressly claimed to be void. There would appear to be no illegality in an agreement to convey the lands when title should have been acquired, although at the time of the execution of such agreement, the title shall be in the United States."*

Fackler vs. Ford, 24 How., 323, sustains this

case. In the case of Marks vs. Dickson, the court held that the assignment of the floats before entry was void, but that power of attorney to assign given before location would support an assignment of it made after location.

We submit that the subject of the controversy was the land, not the scrip. The scrip could not be sold as such and even if actual formal assignment had been made of it and made of it repeatedly, still if presented by Orillie Stram or anybody acting in her name and behalf it was subject to location on the land. *There was no forfeiture of the scrip worked by any assignment thereof.* The scrip was always good and locatable by, in the name and in behalf of Orillie Stram. It will not be claimed that if she had made an actual assignment of it she could not still go and locate the land herself. If she could do this she could locate the land by agent. Suppose she had assigned her scrip to Eaton, and Eaton had tendered a filing in his own name it would have been refused because the assignment would have been invalid; suppose he had thereupon produced a power of attorney to locate it and tendered it in her name. It would have been accepted. The government would not be concerned with her intentions about selling the land, nor with any conveyances made by her thereof. She had a right to agree to sell the land even before it was located or to give another a power of attorney to sell it; and all of the contentions that might arise by reason thereof were contentions, if they existed at all, between the parties.

We invite the attention of the court to the strong reasoning of the trial judge in his memorandum on this point. (Folios 867 to 873, Transcript.)

The Method Adopted was in Accord with the Practice of Long Continuance in the Department.

This was especially true in this section and the northwestern districts, and the decisions of the local land officers show that the method pursued was in accordance with the practice and hitherto interpretation of the land department. It has been estimated, by those who are familiar with the accepted course pursued, that fully two-thirds of the Sioux half-breed scrip was satisfied and extinguished in this way. We are told that a search in the files of the Department, made at about the time of this hearing before the Secretary, which included all adjudicated cases and covering every state where rights under the law were exercised, failed to disclose any case to sustain the view taken by Secretary Vilas, and if any have been cited by counsel for the plaintiff prior to Allen vs. Merrill and the case at bar, we have not been advised of it. No case was found either that held the Secretary's view that a good scrip location could not be made upon the land if it had been surveyed, because there had been an attempt to locate the scrip on the land in its unsurveyed condition.

The examination reached from 1859 to 1889

and disclosed entries upon both surveyed and unsurveyed lands, made both in person and by attorney in fact, and where no improvements had been made and where they had been made by attorney, little regard being given to the matter of improvements where there were no adverse rights attaching.

We submit then, that if the method pursued by Mr. Eaton was in accordance with the then and hitherto existing practice, that no new departure from that practice thereafter should deprive defendants of their rights. If what he did was in accord with the law as actually administered at the time the locations were made, these rights should not be disturbed, and any change in the construction of the law as then and theretofore administered, should not be applied to extinguish rights already acquired under the former practice.

United States vs. Arredondo, 6 Pet., 691.

Case of Chas. P. Masterson on Review, 7 L. D., 577.

Germania Iron Co. vs. James, 89 Fed., 818.

Belden vs. Midway Co., 107 Fed., 602.

We submit then, that the purpose to sell and dispose of the scrip is not shown upon this record and as no sale of the scrip could be made in any event no sale of it could be shown. The purpose was to obtain the land under and by virtue of this

scrip in satisfaction thereof, in the name of the scripee and whether it was for her benefit for the purpose of sale or for the purpose of occupancy, the government was not concerned.

All of these cases show that the government prior to Commissioner Sparks' decision, had never concerned itself therewith, nor was the government concerned with the question of whether the half-breed intended to sell the land at once or to hold it, or whether she had already made a contract to sell it or intended to keep it, nor whether she had given another a power of attorney to sell it, nor whether she had been paid in part or in whole for the land. The government was only concerned with: (1) Whether the scrip was genuine; (2) whether it was presented by an authorized person; (3) whether it was laid upon lands applicable to its extinguishment. There has never been any contention in this case on the first and third grounds. Nor was there for a year after entry any on the second, and then only by virtue of the fraudulent allegations of Hyde which were entirely removed before hearing. What interest, then, had the government in the transaction? What power had the Secretary to say the entry was not valid? There is but one answer: None. The entry was valid.

V.

The Location of the Scrip on July 21st, 1885, Upon the Surveyed Lands was a Valid Location Thereof Without Regard to the Question of Improvements, Even if the Attempts at Previous Location Upon the Land Unsurveyed Should be held Unavailing.

If the Commissioner and Secretary were correct in insisting that in order for the half-breed to locate upon unsurveyed land, she must have personal contact therewith, it was no reason why the entry should not have been sustained as an entry upon surveyed land at the date of adjustment.

The Hyde claim did not originate for a year after the scrip location and the lands had been segregated by such location from the mass of the public domain. Belden vs. Midway Co., 107 Fed., 601. Hyde's claim having been declared corrupt and absolutely invalid and giving him no rights whatsoever, removed all intervening claims so that on July 21st, 1885, when this scrip was adjusted to the lines of the survey, the land would stand the same as though there had never been any other claimant thereto.

If the land was such land as could then be subjected to the extinguishment of this scrip, there

would be absolutely no reason why the location of the scrip could not be made thereon at that time, as surveyed land, without any reference to the question of improvements. Unless there were some valid, existing adverse claims lawfully asserted, which had so far attached to the land as to remove it from location as surveyed land, this must necessarily be true. It has been decided that there were not any such claims. The decision of Secretary Vilas complained of in this case, did not pass upon this question, but in the case of Allen vs. Merrill, page 221, the Secretary held that the adjustment of the scrip to the survey was but an adjustment of the boundaries in perfection of a location previously made and was not an original location of the scrip. But if the land was subject to be taken in satisfaction of this scrip and subject to be taken at this time as surveyed land, what further acts were necessary to take the land than to apply for the same and surrender the scrip in payment therefor, and receive, as was done in this case, the receipt of the Register and Receiver therefor. The scrip had been surrendered to and was held by the government and the form of application was sufficient. (Folio 510 Transcript.)

There was no forfeiture of the scrip by reason of any previous attempt to locate. What reason would there be for the government to say Here is your scrip, you may take any land within the public domain, except this tract which you have already made a futile effort to take. This you cannot take, although there are no intervening rights and although

anybody else can take it with like scrip. What sense would there be in saying you can not take this land with this scrip without you first withdraw it, and we hand it back to you, then you can again hand it to use and we will let you take this land therewith?

we submit that to deny the validity of the location as a location upon surveyed lands and to state such grounds therefor, is to assign, not a reason for a decision, but an excuse for want of a reason.

It seems to have been the rule in the administration of the disposition of public lands that if at the time the final act requisite to patent is done, the claimant is qualified to do it and lawfully does, and performs the act, that it relates back and validates the transaction, without regard to whether every step in the procedure has been regular, unless some valid adverse claim intervenes.

Thus, a pre-emptor who has not in the first instance complied with the naturalization laws, if he does so before the time to make his final proofs and no adverse claim intervenes, the validity of the claim thus established is recognized. (Decision of Secretary Vilas re Jacob H. Edens, 7 L. Dec., 9.) It has also been held that a failure to file a declaratory statement will not perjudice the rights of the settlement in the absence of an adverse claim.

Various of these land laws impose conditions which the government does not take advantage of, except where an adverse claim is recognized. The

Land Decisions are full of cases which evidence this practice. We cited a number of them to the trial court but do not deem it worth while to make selections of cases on this question on this appeal.

Kelly vs. Quast, 2 L. D., 627.
Ry. Co. vs. Painter, 6 L. D. 485, will suffice.

As seen in 8 L. D., page 220, Mr. Vilas has said that a valid entry on surveyed lands passes the title at once to the locator. He has also gone further and said that this would also be true as to a valid entry on unsurveyed lands, from which it may be inferred that he intended to make the deduction that inasmuch as entries upon surveyed and unsurveyed lands were both provided for in the same section, that there could not be upon the same land, an entry under both provisions, even though the entry as unsurveyed land should be held void.

Without at this time discussing the question whether the title would pass at once upon location of unsurveyed lands, the rights of the locator would at least attach thereto and remain intact, until the lands were surveyed and the location adjusted thereto, if the location was valid, the adjustment relating back so as to protect the rights of the scripee as of the date of the first entry. But if it is contended that the first location was not valid because of the want of improvements made by the scripee in person or under her personal supervision and direction, or by reason of any other

infirmity not common to both entries, we contend that the entry was a valid one as upon surveyed lands, and that the previous attempt would be no bar.

The record shows that Eaton made the application on July 21st, 1885, in the name of Orillie Stram, as her attorney in fact, to adjust this scrip to this land and that in the form of that application is contained the phraseology "hereby apply to locate and do locate" the scrip on the tracts, describing them by legal sub-divisions as designated by the survey. (Folio 510 Transcript.) True enough these applications relate back in their references to the location made in June, 1883, on the land in its unsurveyed state, but what was done on July 21st, 1885, was in all respects sufficient to operate as a location and tender of the scrip for the land, and contained all that was necessary for an original application to contain, and if the lands were then in a condition to be disposed of upon proper location of the scrip of this class, and the location thereof would exhaust and extinguish the scrip then it is a good and valid location of the scrip upon the surveyed land.

If Orillie Stram, either in person or by agent could that day have successfully applied for this land in the first instance, had she never made any previous attempt to obtain it, what reason exists by virtue of the fact that she had tried before and failed while the land was unsurveyed, if that was true, to prevent her from obtaining it?

We submit with unlimited confidence that unless there was some other infirmity in the final attempt to take this land, there being no forfeiture of the scrip, no fruitless attempt to obtain it before could deprive the acts of Orillie Stram, through her agent Eaton, on July 21st, 1885, from effectuating a valid entry of this land as surveyed land.

Without waiving any of our contentions under previous heads, we say that there was a good location made here of surveyed lands, and that by reason thereof the only question upon which the Commissioner rested his objection to the entry was removed.

Whether the title which passes to a scripee upon completion of the location is a legal one or only the equitable one, if we have shown that in the exercise of supervisory power, vested or assumed, the superior officers in the land department have reached their conclusion by finding facts not established by the record and by an erroneous interpretation of the law, and have based the same upon regulations made by themselves rather than requirements embraced in the law, then it results that the conclusion of the local land officers was correct and the entry was regular and proper and that the title, either the legal title outright, or if not, at least the full equitable title, vested and no amount of jugglery therewith subsequently in the Department could affect or extinguish the rights of the scrip claimants.

In this connection the language used by the

court in Germania Iron Co. vs. James, 89 Fed. Rep., page 818, in the closing of the decision, seems an appropriate characterization of the attempt to exercise supervisory power in this case. The language was used with reference to the Department suddenly adopting a departure from what had theretofore been its settled practice. The court said:

> "What a farce the attempt to secure rights in a judicial tribunal must become if its rules of practice are applied at the arbitrary will of the judge who presides over the court. Under such an administration of the land department the rights and titles, which the law attempts to protect and secure, become naught but privileges dependent upon the gracious favor of its officers. The power to degrade them to this rank cannot be found in the supervisory authority of the Secretary or Commissioner; their power of supervision is not unlimited or arbitrary. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the person secures a vested interest in the property and right to a patent therefor, and can no more be deprived of it by order of the Commissioner than can he be deprived by any such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it."

VI.

The cases Cited or mentioned in Plaintiff's brief do not Support its Contention nor tend to Confirm its allegations of error. On the Contrary, the whole course of judicial Determination Sustains the Contention of the Defendants.

We cannot know whether counsel will cite the same cases in this court as in the court below, but must assume, in the absence of access to his brief, that he will do so.

Decisions from the land department were first cited and counsel commenced with Allen vs. Merrill, 8 L. D., 207, decided Feb'y 18, 1889, and put it almost bodily in the brief. This case and the Stram case were argued and considered together. The decisions were promulgated at the same time; this was published, the other was not. Next these same cases are quoted at length on review. So far as the office of an authority is concerned, these decisions cannot be considered as such. They do not evidence any prior holding of the Department which was followed as a precedent or which should be heeded by those then doing business with the Department. Their correctness is on trial and the first time they have been put to the test in the courts, they have suffered, and counsel, who seems

to have relied almost wholly on them, has been surprised and disappointed.

As we have said elsewhere, the reasoning of these decisions is a proper subject for discussion, but they cannot be accorded weight as authority. It may be mentioned in passing that in Secretary Noble's decision on review in Allen vs. Merrill, 12 L. D., on pages 155-6, he refers, among other, to the cases of Josette St. Germain, scrip No. 628A., and Nancy Rock, Scrip No. 94C. It is somewhat interesting to note that in both of these cases there was a power of attorney which both authorized the location and the sale of the land thereafter, and Secretary Noble held it good and said there was nothing to challenge the bona fides of the locations. How fortunate it was that both powers were on one piece of paper and run to the same man; if they had been upon two papers, they must surely have been bad, according to the decision of Mr. Secretary Vilas. It is also interesting to note that in this case Mr. Secretary Noble, after reciting the provisions of the law of 1854 said, on page 150:

> "It is perfectly plain to my mind as a matter of original construction, that by the act of congress the scrip in question was intended to be the evidence of a purely personal right in the half-breed to locate and receive patent for the number of acres of land therein called for. That this is true is clearly shown by the declaration in the act that no transfer or conveyance of the scrip shall be valid. If the scrip could not be legally transferred or assigned, it must necessarily follow

that it could not be used as a means to acquire title to lands by any person other than the half-breed himself, or by his agent or attorney. It was, therefore, obviously intended for the sole benefit of the half-breed; it could be lawfully located only by him in his own person or for his sole use and benefit by his legally constituted agent or attorney. These propositions will scarcely be seriously questioned. They are the result of the clear and unambigious provisions of the statute."

He then said that it was clear to his mind that the entries in question were not made by the half-breeds in person nor by their legally constituted agent or attorney, nor for their sole use and benefit, and on page 153 he says:

"That a power to sell may extend to lands afterwards lawfully acquired by means of scrip, is not attempted to be controverted," and on page 154, referring to the case of Sophia Felix he said: 'In that case there was nothing to show that there had been, in fact, a transfer of the scrip by Felix, half-breed,' and on page 155, he said: 'It is not denied that improvements may be made by an agent.'"

So that, Mr. Secretary Noble is found to have declared in these statements that a power of attorney to locate and a power of attorney to sell, given before location, are both valid and may be contained on the face of one and the same instrument; that it is a valid thing to do to locate by agent or attorney; that it is equally valid to make improvements

by an agent or attorney. It would seem then, that so far as the Stram case is concerned, it would be difficult to find lodgment in his mind for a determination adverse to the Stram scrip location, for Eaton was specifically authorized to locate the land for her, and to do all things necessary to effect a valid entry, and, unlike Secretary Vilas, it is no objection in his mind that a power of attorney was given to a person to sell the land after obtaining it. Eaton had made an arrangement by which this power of attorney was given just before the location and improvements were made. A certain amount of money was paid, more was to be paid after the entry was completed and she had affirmed the same and conveyed the land.

If improvements could be made by an agent, personal contact was not necessary. It appeared on the face of the power that Eaton was authorized to do all things necessary to make the location, and the evidence shows that he made these improvements, or caused them to be made for the purpose of effecting the location. Clearly then they were made by her duly constituted attorney in fact. What was there left by which, so far as this case is concerned, Secretary Noble could reach an adverse decision? It can only be found in the statement that, in his view, as a matter of original construction the act conferred a personal right and that because of the prohibition against the assignment of the scrip, it must follow that the scrip could not be used as a means to acquire title to lands by any other person than the half-breed himself, or by his agent or

attorney, and that it was, therefore, obviously intended for the sole benefit of the half-breed and that the land could only be located for his sole use and benefit; all of which, he said, is the result of the clear and unambiguous provisions of the statute.

This logic is beyond comprehension, that the half-breed could make the improvements and could locate by attorney in fact or agent, could give a letter of attorney before the location to sell the land when it should be located; did not need to live upon the land an hour; had a perfect right to sell it the minute it was located and, before its location, to authorize a sale, and yet, at the same time, must take the land and receive patent therefor, for his or her own personal use and benefit. We submit that this reasoning is absolutely contradictory of itself. So far as he says that the land must be taken only by and in the name of the scripee, either in person or through an authorized agent or attorney and cannot be located by any one else, because of the provision against the assignment of the scrip, he is clearly right, but, we submit, that he cannot go beyond that and still be right, nor go beyond that without contradicting his own premises. His holding in effect is that the provision with reference to the assignment of the scrip is prohibitory of any alienation of the land until patent is received.

In the Stram case, on review, which immediately follows the case of Allen vs. Merrill in the 19 L. D., Secretary Noble did not re-discuss these

questions, but substantially passed the case upon his opinion as given in the case of Allen vs. Merrill.

Taking the decision of Secretary Vilas in connection with these decisions on review, we learn with reference to these matters the following things:

That the land is granted to the half-breed without any restrictions upon his alienation thereof and as to surveyed lands, he need never see them, and that he may sell the lands as soon as location is complete;

That it is the unambiguous provision of the statutes that the right to take these lands and receive patent therefor is a personal right, and that the same can only be taken for his own use and benefit;

That as to unsurveyed lands he must have personal contact with the land and that the improvements must be made by him or under his personal supervision;

That the improvements may be made upon unsurveyed lands by an agent or attorney in fact, and as he can sell the land as soon as location is complete that, in such a case, he need never see the land;

That there is no requirement that a house or habitation be built upon the land;

That the improvements must be for his own personal use, benefit and enjoyment;

That it is perfectly competent and leaves nothing to challenge the bona fides of the transaction to

give a power of attorney before location authorizing the location and the sale of the land thereafter;

That to give two powers of attorney, one to locate and the other to sell, renders the whole transaction invalid, including the location;

That to give powers of attorney to locate the land and to sell the same operates to work an assignment of the scrip and hence invalidates the authorized act of location, altho' the same is made in the name of and for the half-breed;

That the half-breed is unable to make an assignment of the scrip; that such a thing is impossible.

We freely confess our inability to find any element of consistency in these conclusions.

The other four cases in the land department decided subsequently to Allen vs. Merrill which have been referred to by counsel, simply apply the ruling of Allen vs. Merrill, and hold that in order to make valid a location on unsurveyed lands it is necessary for the Indian to have made or caused to be made improvements on the land for his own personal use and benefit. As they cannot be of any force in determining the rights of these parties, it is not worth while to refer to them.

We cannot refrain, however, from noting a remarkable passage which occurs on page 372 in the case of McGregor vs. Quinn, 18 L. D., which is as follows:

> "Clearly then, under the law, the rules and the departmental decisions, it is incumbent up-

on the Indian to identify himself with the land in such a way as to show his good faith in availing himself of the bounty the government has bestowed upon him, by making or causing to be made for his own personal use and benefit improvements on unsurveyed lands prior to the location of his scrip."

The clerk who wrote that decision (we do not have the honor to know whom the initial letters on the opinion designate) has the notion that this Act of 1854 made a GIFT to the Indian as a mere bounty on condition of his *settlement and occupancy.* These later land decisions announce no principle and tender no reasoning. They are decided on the strength of Allen vs. Merrill and in one of them at least it is held that where two powers of attorney, one of them to locate and the other to sell, were given, that it worked an assignment of the scrip and that the entry should be cancelled. If the power to locate and also thereafter to sell had been upon the face of the same paper as in the cases approved by Mr. Secretary Noble, perhaps the writer of this opinion would have held the entry good. He said the double power of attorney worked an assignment of the scrip. Again we suggest that this was impossible. The scrip could not be assigned. The scrip was tendered in the name of the scripee. The writer of the opinion must then have concluded that the government did not intend to allow the half-breed to take the land unless he kept it. He may possibly have been of the mind that the act contained such provisions as the treaty in-

volved in the case of Smith vs. Stevens, 77 U. S., 321, prohibiting the alienation of the lands allotted to the half-breeds. Clearly he had no proper conception of the act in question.

In another of these cases, that of John W. Poe, 29 L. D., 309, an assignment of the scrip in form was made and the entry had been made in the name of the assignee, which the land department refused to affirm.

The case of Felix vs. Carroll, decided by Otto, we may pass by with the consideration which we have given it elsewhere and with the consideration given it by the trial court in his memorandum, with the declaration that it is an affirmative authority in support of all of the contentions of the defendants in this case, and that it stood unchallenged, until the decision in this case. (See Appendix B, Mr. Harris' brief for defendants Eaton and Lonstorf, for this decision in full.)

Murphy vs. Jones, not published, was printed in full as Appendix D to plaintiff's brief in the Supreme Court of Minnesota, page 146, and also again nearly in full at page 57 of the brief. In that case the contention was simply between a settler of the land and the locator of the scrip. The locator claimed he had plowed a half acre of ground. The settler came a year later and saw no improvement, was not apprised of the location of the scrip, settled upon the land, built two houses, fenced thirty acres, cultivated a considerable of the land, dug a well, etc. The Secretary held that there were no improvements sufficient to entitle the scripee to lo-

cate the land. *They had been so slight that they did not serve the purpose of giving notice to the settler and to avoid conflict,* and the Secretary awarded the land accordingly. There is absolutely nothing else in the case.

The case of United States vs. Chapman, 25 Fed. Cases, 407, s. c., 5 Sawyer, 528, absolutely decided nothing else than that Sioux half-breed scrip could not be located on lands already occupied by another, and that the land, at the time it was attempted to lay the scrip, was occupied with valuable improvements thereon by one Mrs. Polack under valid selections of land through a grant to the state, the location in her behalf made in pursuance of the law, having been approved by the local land officers. In a recital prior to a consideration of the real question at issue, where the court was stating the explanation which had been made of the presence of the scrip which had been pigeon-holed in the land office, it was merely mentioned that Chapman had made an attempt to locate the scrip on the land in 1866, but that inasmuch as the Indian or half-breed never lived on the land or resided in the state, the land being unsurveyed, no such location could then be legally made, and that is the language the counsel sees fit to quote. The attempted entry, whatever it was, of 1866, was not on trial. The scrip entries in the land office had been examined prior to the time of Mrs. Polack's entry, and it was found that there was no entry on the land. Afterwards, in 1868, the scrip was found in the land office and it was explained that there had been this

previous attempt and that the scrip had been mislaid, and an attempt was then made to locate it in 1868 and, by certain erasures, to place it ahead of Mrs. Polack's selection of the land. This was the attempted location which was on trial. It was found incidentally in the case that Chapman had no power of attorney to locate the scrip, but the court held that at the time of the attempted location thereof the land was occupied and improved by another and that the scrip could not be located upon occupied lands except within the reservation in Minnesota on behalf of the occupant. We cannot find any explanation for the citation of such a case in support of the plaintiffs' contention, unless it is done on the theory that the courts would never look at the decision.

Rose vs. Wood and Lumber Company, 73 Cal., 385, was a case arising upon Soldiers' Additional homestead entry, the question being whether the right to locate a soldiers' additional homestead was assignable and whether provisions of the homestead act restricting the right of location were applicable to the grant of the additional homestead right. The court held that such restrictionary provisions including residence upon the land were not applicable and that the right was assignable and that the right of alienation existed unless expressly prohibited and the court then said:

> "In all cases where it has been the intention of congress to prohibit the alienation by the beneficiary, such intention has been clearly expressed. Thus the act of congress of 1854

under which the Sioux half-breed scrip was issued provided expressly that no transfer or conveyance of the certificate should be valid."

Why should this case be cited by plaintiff? The law of 1854 itself expressly said that the certificate or scrip was not assignable. The Supreme Court of California holding that in the case of soldiers' additional homesteads the law did not restrict the assignment of the right, referred to this provision of this law. Nobody is here claiming that the scrip is assignable; on the contrary we have repeatedly stated that it could not be assigned.

Gilbert vs. Thompson, 14 Minn., 544, is the next case referred to. We have ourselves already referred to this case. The trial court, in its memorandum, has quoted from it and it needs no argument to show that this decision strongly supports the contentions of the defendants that while the scrip could not be assigned there was no prohibition on the alienation of the land and nothing to prevent the half-breed from giving to another a valid power to sell it when it should be acquired even before the land is located and consequently nothing to prevent the half-breed from making the contract in advance herself to sell the land.

Thompson vs. Myrick, 20 Min
is the next case referred to. In t
was attorney in fact of certain n
certain half-breed scrip. As such
he was empowered to locate the same. He made a contract with one Benjamin Thompson for the con-

sideration of $2800 to be paid by Thompson whereby he placed said scrip and powers of attorney in the hands of said Thompson with the view of locating the same in the name of the minors and agreed upon the location of the scrip to secure the title of the land to be vested in Thompson, in other words agreed to sell it to him. Thompson was to secure the payment of the note which he gave, upon the land. Pursuant to this agreement the scrip was located in the name of the minors by Myrick, as their attorney in fact, upon the lands which Thompson was then occupying and which were the subject of the transaction. After it was entered, however, Myrick caused the same to be conveyed to his wife. Thompson showed that Myrick still controlled the land or portions of it; that Myrick had never tendered him a deed; that he had been willing to pay the note and had so advised Myrick; that Myrick had demanded payment of the note and at one time had offered to convey four-fifths of the land upon payment of the note although he had not tendered a deed; that he offered then to raise the money and pay the note provided Myrick would convey the whole of said lands to him or give him security to protect the title to the rest of the lands, which Myrick refused to do. The court below found that Thompson was entitled to judgment directing and decreeing that Myrick and his wife convey to the plaintiff certain of the lands. It was claimed that the agreement was void as contravening the provision of the act against the assignment of the scrip and that it was further void because it contemplat-

ed the location of the scrip upon lands other than those upon which the scripees had made improvements. The court said that as to the point that the only object of the contract was to accomplish a transfer of the scrip, there was nothing to distinguish the case from Gilbert vs. Thompson, 14 Minn., 544; and that as to the other question the requirement as to improvements was as to "other unsurveyed lands" not as to "other unoccupied lands" and that when Thompson had surrendered this land to the location of the scrip that he had abandoned his occupancy. Other questions were raised in the case and the court said that as Myrick's relation as attorney in fact to locate the scrip ended upon such location, it could conceive of no reason why Myrick was not at liberty *either before or after the location was made* to enter in an agreement to secure title to the plaintiff upon the payment of an agreed consideration. Clearly so far as this case has application to any of the questions involved in the case now before the court it is favorable to the contentions of the defendants.

Coursolle vs. Weyerhauser, 69 Minn., 328 has been cited.

In this case a half-breed minor twenty years old but representing himself to be of full age, holding Sioux half-breed scrip issued under this Act of 1854 had agreed to sell his scrip to one Dorr and executed two powers of attorney, by one of which he appointed Dorr his attorney to select and locate the land and by the other appointed him his attorney to sell it. Dorr acting under the powers had

entered and conveyed the land. Afterwards the entry was cancelled because the plaintiff was a minor and he then executed another power of attorney to enter the land, being then 28 years old. On this entry patents were issued. The contention of the defendants was that the plaintiff was barred from claiming the land, first, by laches, second by abandonment, third, by estoppel, and the court said that the facts presented strong equitable reasons in favor of the contentions although the court said that the defendants could not be claimed to be innocent purchasers as they were charged with full knowledge of all of the means by which the title was obtained. On page 331 the court uses this significant language:

> "In view of the usual manner of dealing with this half-breed scrip and the land entered or to be entered with it, which are matters of common knowledge, it is evident that the defendant intended to and supposed he was disposing of all of his interest in the land entered with the scrip and that he always supposed he had done so until some undisclosed influence induced him to assert the contrary after the lapse of a quarter of a century."

The court then said that his execution of the second power in 1878 with full knowledge of what had been done and of the purpose for which the power was desired, followed by his omission for 17 years to assert any claim to the land while others were paying the taxes on it and dealing with it on the faith and validity of the title would seem to

make a strong case of laches and of abandonment of the land but said they did not place their decision exclusively upon that ground and held that the doctrine of ratification was applicable. We submit to the court that this decision tends to sustain the contentions of the defendants in this case both on the matter of the usual dealing with this scrip and that by such a course the *interest in the land is parted with* as well as on the point of *ratification and confirmation.*

The quotation which plaintiff's counsel has heretofore made from this case is not of matters which the court decided but of matters which the court recited might be conceded for the purpose of the argument and yet be ineffectual to sustain Coursolle's claim to the land. Counsel did not see fit to quote the further statement of the court, made in the same connection to the effect that it might be conceded that when the land is entered with such scrip it becomes the property of the scripee unaffected by any prior acts or contracts on his part and that the act of congress merely provided that "no transfer or conveyance of any of said certificates or scrip should be valid" and further that an attempted transfer of such scrip does not involve any moral turpitude or any breach of legal duty but is simply ineffectual. *These statements of the court are further in support of our argument in this case that no act that the parties could do would affect the validity of the entry if the entry was made either in person or by one authorized to make it,* and hence that any agreement to sell the scrip prior to the loca-

tion of the land could not affect the right to have the scrip entered and the land taken by or in the name of the scripee. We consider this case on the whole as strongly supporting the decision of the trial judge, and the decision in the case at bar in the Supreme Court of Minnesota is in line with this case and with every case in that court touching any of these questions.

Dole vs. Wilson, 20 Minn., 356, (Gil. 308), is cited as having a bearing upon the construction placed upon the act in question.

This case involved, as stated by counsel, Chippewa scrip. The court held that the scrip was not assignable but that the person named in the scrip could make a valid contract to convey the land on which it might be located and that such contract would not be affected by the fact that there was an attempt to transfer the scrip. The agreement entered into between the plaintiff and the defendant in the case of Dole vs. Wilson, was in writing and specifically contracted to sell 28 pieces of Chippewa land scrip of 80 acres each at a stipulated price; and the complaint set out that the 28 half-breeds to whom the scrip was issued had, for a valuable consideration, paid by the plaintiff, agreed to convey by good and sufficient deeds with covenants of warranty and seisin all such lands as might be selected and entered by them, either in person or by attorney to such party as should locate such certificates or scrip, his heirs and assigns on demand after the location thereof, and that these agreements of the half-breed were conveyed and delivered as an inci-

dent thereto to the defendant and that the pieces of scrip were located on the public lands and that the lands had been patented to the half-breeds and that the half-breeds had conveyed. The action was to recover the price agreed to be paid to the plaintiff and while the court held that if the defendant's promise to pay was founded solely upon the attempted sale of the certificates as a consideration, the promise would be nudum pactum, it held that the complaint showed that the scrip was accompanied by an agreement to convey, delivered in connection with the scrip and as incident thereto, and was part of the consideration of the defendant's promise and that the same supported a good consideration. The court said on page 312 of the Gilfillan edition:

> "Inasmuch as the scrip was unassignable and the title to the same could not be transferred, we see no reason why it was not entirely competent for the half-breeds to revoke their delivery and to assert their right to the scrip and to the possession thereof regardless of the delivery. But, notwithstanding they had this right, it was also competent for them at their option to suffer the defendant to retain the actual possession of the scrip as they appear to have done ******** As to the agreements to convey, they are certainly per se unobjectionable. The treaty not only contains no prohibition of such conveyance but it expressly provides that the lands are to be secured to the half-breeds 'by patent in the usual form.' "

This then is authority to the effect that any agreement to convey the scrip could not defeat the

entry or the right of the Indian to have the lands and also to the effect that a contract, even before location, to convey the land would not defeat the location.

There were a great many provisions in the Chippewa treaty of a limiting and restricting character not found at all in the Act of 1854 to which we shall refer in another connection.

The lands were to be selected by the terms of this grant under the direction of the president. The president directed the land department to provide a means for carrying into effect the grant and the land department devised a form of unassignable scrip, under which the land had to be taken by or in the name of the scripee. The language of the court respecting alienation is therefore significant. Clearly any restriction of a personal character did not in that case nor in Sioux half-breed scrip extend beyond the location of the land and the patenting of the same in the name of the scripee.

Notwithstanding the comments of counsel as to Eaton's entry of the land for Stram, we again assert that the government, having contracted to give these lands for a return of the scrip, the land being subject to location thereunder and no adverse rights attaching, upon the reasoning of these cases the Secretary of the Interior had no right under the guise of a supervisory power to set aside or cancel or annul the location of the scrip upon the land. The government had no interest in not having the scrip located upon the land. All

other questions concerning it were purely questions between the parties in which the government had no interest.

Felix vs. Patrick, 145 U. S. 317, has been cited by counsel, and it is claimed by him to be decisive of all of the points in the case at bar.

The location under the scrip involved in the case of Felix vs. Patrick was the same location which was sustained by the land department in the case of Felix vs. Carroll. This case is reported in 36 Fed. Rep., 457, and again reported on appeal in the 145 U. S. 317, Book 36, Lawyers Ed., 719. It was not decided either in the court below or in the appellate court on any other proposition than that of laches. The validity of the location as the location of Sophia Felix was not questioned and while Mr. Justice Brown in the opinion said that the parties by the use of a power of attorney and blank quit claim deed had attempted to avoid the prohibition against the assignment of the scrip, he also said that the moment the scrip was located the land became Sophia Felix' and subject to her disposition. The case went to the courts on a demurrer to the bill. The land was within the limits of the City of Omaha. It appeared as an admitted fact that the scrip for 120 acres with a blank power of attorney and the deed executed in blank had been obtained from Sophia Felix, the scripee, by fraud and that Patrick had obtained possession of the scrip and these blank instruments from some unknown person. Prior to that time he had been in possession of the premises seeking to acquire the same by

pre-emption, but the land being within the corporate limits of Omaha, he had been unsuccessful. After obtaining the scrip he entered the land and a patent was issued in the name of Sophia Felix. The blanks were filled up and the blank deed filled out and the land conveyed. It was alleged, and stood admitted, that Patrick knew of all of these transactions and that he did not pretend that he was acting as the agent of Sophia Felix. Certain acts of congress had been passed in the attempt to confirm the title to the land. The decision was rendered in 1888. Sophia Felix had been dead since 1865. Her father and mother had been dead for years. Her brothers and sisters as the surviving heirs were the plaintiffs. The two principal points urged in support of the demurrer were the effect of the confirmatory acts of congress and the staleness of the claim. The court declined to pass upon the question whether the patent had been improperly issued and rested its decision solely on the question of the staleness of the claim, after the land involved, by the growth of the city, had become enhanced in value without any acts, whatever on the part of the plaintiffs. The court said that Patrick never intended to act or pretended to act as the agent of Sophia Felix and it was not even alleged that she parted with the scrip to an agent but that it was obtained from her by fraud and the court declined to consider the matter as a case for the application of the doctrine of constructive trusts and passed on to determine the case on the question of laches and the staleness of the claim and Mr.

Justice Brewer in the case as reported in the 36 Federal used the language with reference to the intelligence and capacity of the half-breeds that we have cited in another part of this brief.

The court will notice that the Supreme Court in affirming the decision of the lower court decided the case upon the same question of laches. The facts which stood admitted showed that Felix had never even parted with the title to the scrip or tried to do so, and was the owner thereof and that the papers were all obtained from her by fraud, and that Patrick had procured the scrip with the intent to appropriate it to his own use and to defraud Sophia Felix out of the same and of all benefits thereunder. The quit claim deed entirely blank both as to land and as to parties, obtained from her, under which Patrick claimed, was obtained before there was any land entered or located and admittedly was obtained by fraud. It does not seem to us at all surprising that the courts below declined to coincide in the view of the plaintiff's counsel that this case is decisive of the case at bar. The facts of the case are not the same by any means as in the case at bar, and the issues involved were very different. We are quite sure the learned Justice who wrote the opinion will be surprised that it is claimed the questions decided in that case determine the issues in this. In fact it furnishes no support to the plaintiff's contentions and we say again as before that this court is practically without any authority cited to it in support

of the plaintiff's contentions, save and except the Secretary's decisions.

Smith vs. Stevens, 77 U. S., 321, was quoted from at some length by counsel for plaintiff in error to show that the treaty of 1825 in question in the decision, contained numerous prohibitions and restrictions and provided specific ways in which the lands covered by the treaty could be conveyed. Neither the case nor the treaty have any kind of application to the case at bar and we suppose that counsel cited the case to show that in cases where the government thought it was necessary to do so, it put safeguards and restrictions about the alienation of lands granted to Indians.

The plaintiff's counsel cited a number of cases to the Minnesota court stated to be upon the subordinate propositions involved in the discussion of this case.

Under that head he made a quotation from Lytle vs. State of Arkansas, 9 How., 314, the quotation being made from page 333, simply stating that it is the policy of the government to allow the adventurous pioneer who has settled upon unsurveyed land to take 160 acres under the pre-emption law. This case was under the pre-emption law of 1830. Of course neither the decision nor the quotation has any kind of relevancy to matters involved in the case at bar, but while counsel was quoting therefrom he might have quoted from the same page 333 the following very well declared doctrine:

"It is a well established principle that where an individual in the prosecution of a right does everything which the law requires him to do and he fails to obtain his right by the misconduct or neglect of a public officer, the law will protect him. In this case the pre-emptive right of Cloyes having been proved, and an offer made to pay the money for the land claimed by him, under the act of 1830, nothing more could be done by him, and nothing more could be required of him under that act."

This suggests that when the scrip in this case had been tendered by the half-breed in payment for the land selected and there were no intervening adverse rights that she had done all she was required to do in order to obtain this land.

Buxton vs. Traver, 130 U. S., 232, Atherton vs. Fowler, 96 U. S., 513, and Johnson vs. Towsley, 13 Wall., 72, quoted by counsel in his brief below do not require any attention.

Atherton vs. Fowler decided that no right of pre-emption can be established by a settlement and improvement on public lands where the claimant has obtained possession by breaking into the enclosure of another who has already settled upon, improved and enclosed the same land and that such an intrusion although made under the pretence of pre-empting the land is but a naked, unlawful trespass. We should hardly wish to concede that we had to combat that proposition in order to sustain the issues of this case. We suppose counsel made the long quotation from that case because the court

used the expression that the policy of the government had been gradually changed until in 1862 pre-emptions were allowed on both unsurveyed and surveyed lands; but long prior to 1862 pre-emptions were allowed on unsurveyed lands, as we have seen.

Webster vs. Luther, 50 Minn., 77, was quoted from as showing what was the intent of the government in the homestead act, namely; to secure settlement, peopling and cultivation of the lands.

Anderson vs. Carkins, 135 U. S., 483 was also quoted from at length relative to the restrictions against the alienation of homesteads and that the homestead was intended for the exclusive benefit of the homesteader. Of course the homestead law required settlement and residence and contained provisions against alienation, but what was the policy of the government in the enactment of the homestead and pre-emption laws and the policy of the government in the Act of 1854 are quite different things.

Monette vs. Cratt, 7 Minn., (Gil.,) 176, has already been quoted from by us near the beginning of our second chapter. We again call the court's attention to Judge Atwater's language on page 184, where he said:

> "The main object of the Act of July 17th, 1854, appears to have been to get rid of the Indian or half-breed title to the reservation on the west side of Lake Pepin and to bring the same into market."

The cases of Myers vs. Croft, 13 Wall., 291, and Quinby vs. Conlan, 104 U. S., 420, were also cited. These cases held that the restriction upon the right of pre-emption did not extend to a restriction upon the alienation of the land after the entry was made. We know of no benefit which the plaintiff in this case can extract from these cases. As to such cases as Meyers vs. Croft, Camp vs. Smith and other cases which we have cited upon another page of this brief, we make the contention that upon principle they support the claims of the defendants in this case to the land in question and that they cannot be distinguished in their application of the law from the principles and policy which we invoke in this case. The personal limitations were only given effect as related to the right to enter before entry was made.

Some other cases quoted from by counsel do not seem to require any discussion from the defendants in error.

The case of Fee vs. Brown, was greatly relied upon by counsel in the trial court but little was said about it in his brief in the Supreme Court of Minnesota which perhaps was an act of prudence. The case is found in 162 U. S. 602, Law. Ed., Book 40, page 1086.

It arose under the Chippewa Indian act. The proclamation by the President of the treaty with the Chippewas was dated September 30th, 1854. The act was passed December 19th, 1854. (See 10 Stat. at Large, 598), being passed subsequent to the proclamation of the treaty. The act was radically

different from the Act of July 17th, 1854. The restrictions upon alienation were very different. Among other things it was provided that the patents should expressly declare that the lands should not be alienated or leased until otherwise ordered by congress. The purpose of the act was to locate within certain territory those bands of Indians upon tracts of land in severalty and endeavor to inculcate in them a spirit of homebuilding and following agricultural pursuits, and to prevent not only the alienation of the right to take the land but to prevent the alienation of the land until congress should thereafter become satisfied that they had become sufficiently progressed in the arts of civilization to have the restrictions removed, the act clearly contemplating the residence of the Indians upon the parcels awarded to them. Yet the scrip was dealt in as such and a large amount of lands located thereunder in sections of the public domain far outside the ceded territory, in many cases by persons who had no intent to do wrongful act. An inquiry was made into the subject and acts were passed permitting such persons to purchase the land at less than the government price, this being done in the interest of what the government thought to be a fair and equitable adjustment of the difficulties which had arisen.

The lands in question in the case of Fee vs. Brown were located in the State of Colorado, and one of the questions at issue in the case was whether the location of the scrip could be made in any

event outside of the ceded territory, and another question was whether the Act of 1872 referred to authorizing the purchase of lands located with claims arising under the seventh clause of the second article of the treaty, could be held to apply to lands so located outside of the ceded territory; and all that the case decides is that the treaty should be considered with the act of December 19th, 1854, and that the location was intended by the government to be within the ceded territory, and that the Act of 1872 being intended to give relief to persons who had located lands by mistake and misapprehension of the law, it should not be given so narrow a construction as to be confined within the said territory. As the learned Justice who wrote the opinion said, the case turned on the Act of June 28th, 1872. No question in this case was there involved.

We have never been able to see what benefit counsel could extract from the case. Yet he referred to it in his brief in the Supreme Court of Minnesota and has, at times, strongly asserted it as an authority in some way for the plaintiff in error.

The case of Monette vs. Cratt, 7 Minn., 234 (Gil. 176), has been referred to by the plaintiff but aside from what the court may have said relative to the supervisory jurisdiction of the officers of the land department there cannot be found in it anything to sustain the claims of the plaintiff or the construction which it asks the court to put upon the law. The case was before the court on de-

murrer. Two half-breeds had located scrip upon the same tract within the reservation. The decision had been in favor of one of them. It had been carried to the Department and the Secretary of the Interior disallowed the Cratt location and allowed the location of Monette and patent issued to her. The complaint does not appear to have set forth any grounds of error in the decision of the Secretary, but it was claimed that he had no right or power to decide the question; that after the question had been determined by the local land officers that the courts only had jurisdiction. We find nothing in the decision even suggesting anything contrary to the construction of the law of 1854, which we have contended for.

On page 113 of his brief in the Minnesota court, the counsel quoted from the case of Webster vs. Luther, to show that the court will not be bound by a practice and construction placed upon the law by the executive department and will not permit such construction or practice to defeat the obvious purpose of the statute. This seems to be a strange citation for the plaintiff to have made after having relied so strenuously upon certain departmental decisions which clearly rested upon something outside of the statute for foundation. What *we* claim is that the departmental decisions cannot incorporate anything into this law or add anything to it upon which to rest their course of practice or upon which to determine the rights of these parties. It was upon just such an unwarranted regulation

that the Secretary undertook to deprive defendants or their predecessor, of the land in question.

We have thus spent much time in reviewing these cases, but we have done so because we are confident that an inspection of the cases will show the court that they are not only wanting in sustaining the claims of the plaintiff in error, but, on the contrary, that so far as they contain matter applicable to the issues of this cause, they are on principle in favor of the defendants; and that in these very cases many of the questions surrounding the issues in the case at bar are determined favorably to the contentions of the defendants and that the decision of the learned trial court and his reasons therefor as expressed in his admirable memorandum, and the decision of the Supreme Court of Minnesota, are in accord with the determination of these principles in these cases and other cases cited by us and only at variance with the decisions of the Secretary of the Interior commencing with the case of Allen vs. Merrill; that the Secretary cannot, as oft declared by the courts, under the cloak of supervisory power, cancel or annul the entry of the claimant arbitrarily or in contravention of her rights; and unless his decision was founded on a correct construction of the law and was in accord with the facts as shown upon the record, it cannot operate to deprive the defendants in error of their remedy in court.

For the errors complained of in our answers, established on the trial and set forth in the first chapter hereof, and so determine by the trial court

and by the court of last resort of our state, the decision of the Secretary was erroneous and was subversive of the vested rights of the defendants and of their predecessor, the scripee.

The judgment of the Supreme Court of Minnesota should be sustained.

In the various cases arising among parties who were attempting to get these lands, or some part thereof, to which cases these defendants were not parties, some of which cases have been referred to, the court will notice such names as Hyde, Hartmann, Germania Iron Co., and others. In these cases can be seen the index finger pointing toward the plaintiff in error the so-called "Midway Company," which, through various of its minions, has tried to extend its grasp to these lands. The trial Court, who had a good opportunity to get a correct measure of the parties, used apt language when in the closing paragraph of his memorandum he said: "Plaintiff in this case is simply trying to take from the defendants property acquired in good faith under a locaton made as thousands of others were."

It is undoubtedly the fact that years ago substantially all of the Sioux half-breed scrip was located, and located in the manner this was.

Shall perfidy and greed be rewarded by depriving the rightful owners of that which was acquired in good faith, in violation of no law and in accord with the accepted and settled practice and multitudes of titles be unsettled, or shall they not? Our courts have said in no uncertain way *it shall*

not be done, and we have unlimited faith that their judgments will be sustained in this the last tribunal which can deal with these questions.

Duluth, August, 1901.

Respectfully,

JED L. WASHBURN,

Attorney for Defendants in Error, Merril M. Clark, Richard H. Fagan and Leonidas Merritt.

WILLIAM D. BAILEY,
Of Counsel.

P. S.—Wherever italics appear in this brief they are our own.